CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 814

THE STATE TAX COMMISSION OF UTAH,
PETITIONER,

vs.

MALCOLM P. ALDRICH AND MARY S. HARKNESS,
ADMINISTRATORS WITH THE WILL ANNEXED
OF THE ESTATE OF EDWARD S. HARKNESS,
DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

PETITION FOR CERTIORARI FILED DECEMBER 24, 1941.

CERTIORARI GRANTED JANUARY 12, 1942.

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[fol. 1]

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF UTAH IN AND FOR THE COUNTY OF SALT LAKE

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased, Plaintiffs,

against

STATE TAX COMMISSION OF UTAH and UNION PACIFIC RAILROAD COMPANY, a Corporation, Defendants

COMPLAINT

Come now the plaintiffs above named and for cause of action against the defendants and each of them allege:

First Cause of Action

1. Edward S. Harkness died on the 29th of January, 1940 and at the time of his death was an actual and bona fide resident of and domiciled in the State of New York.

2. Said decedent left a last will and testament which was admitted to probate on the 15th day of March, 1940 in the Surrogate's Court of New York County, State of New York, and on said date plaintiffs were by said Surrogate Court appointed executors of the last will and testament of said decedent and thereupon qualified as such and ever since said date have been and now are the duly appointed, qualified and acting executors of the last will and testament of said decedent.

3. On the 28th day of August, 1940, plaintiffs were appointed administrators with the will annexed of the estate of said decedent by the Third Judicial District Court of the State of Utah in and for Salt Lake County and ever since said date have been and now are the duly appointed, qualified and acting administrators with the will annexed of the estate of said decedent.

4. The defendant State Tax Commission of Utah is an [fol. 2] administrative body created by the statutes of the State of Utah with power and authority to sue and be sued.

Said defendant is by said statute required to collect and pay over to the State Treasurer all inheritance taxes due to the State of Utah under the provisions of Chapter 12, Revised Statutes of Utah 1933 as amended, and to prosecute actions at law for the collection of such taxes and to enforce and foreclose any liens securing payment of such taxes and to release and discharge any such liens.

5. The defendant Union Pacific Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Utah.

The executive offices of said Railroad Company are and for many years have been located in the State of New York. The meetings of the Board of Directors and of the Executive Committee of said Board are now and for many years have been held in the State of New York. An annual meeting of the stockholders of said Railroad Company has been held within the State of Utah in May of each year.

The only office for the transfer of shares of its stock maintained by said Railroad Company is and has for many years been continuously located in the State of New York where its stock books and stock records are and have been kept. The shares of stock of said Railroad Company are not, and for many years have not been, transferable upon the books of the Company within the State of Utah.

The said Railroad Company operates railroad lines in thirteen states, including railroads leased from companies all or substantially all of whose capital stock is owned by it. During 1939 the railway operating revenue both from Utah intra-state business and the Utah proportion, on a mileage basis of inter-state business was 8.97% of the entire gross railway operating revenue of said Railroad Company. Upon information and belief, the relation between the revenue within the State of Utah and the total revenues of said Railroad Company continued to be approximately the same in January, 1940 as the relation hereinbefore alleged for the year 1939. The number of miles of tracks operated by the Railroad Company in the State of Utah is and in January 1940 was less than 9% of its total operated miles of tracks in all States.

6. At the time of his death decedent was the owner of [fol. 3] 10,000 shares of common stock and 400 shares of

preferred stock of the defendant Union Pacific Railroad Company, standing in the name of said decedent on the books of said defendant Union Pacific Railroad Company. Said shares of stock were at the time of the death of said decedent and now are of the fair market value of more than $10,000.00.

7. Decedent never at any time had his domicile in the State of Utah nor was he at any time a resident of said State. Decedent never at any time conducted or carried on any business in said State. The certificates representing said shares of stock were never within the State of Utah and were in the possession of said decedent in the State of New York at the time of his death and are now there in the possession of plaintiffs as executors of the will of said decedent.

8. The defendant State Tax Commission of Utah claims and asserts that the transfer of said shares of stock from said decedent as a result of his death is subject to the inheritance taxes imposed by the provisions of Chapter 12, Revised Statutes of Utah 1933 as amended and that said shares of stock are subject to the lien securing the payment of such inheritance taxes.

Said Chapter 12, Revised Statutes of Utah 1933 as amended provides:

"80-12-2

"Amount of tax on net estate.—A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, whether a resident or non-resident of this state:

Three per cent of the amount by which the net estate exceeds $10,000 and does not exceed $25,000;

Five per cent of the amount by which the net estate exceeds $25,000 and does not exceed $75,000;

Eight per cent of the amount by which the net estate exceeds $75,000 and does not exceed $125,000;

Ten per cent of the amount by which the net estate exceeds $125,000; provided, at the discretion of the tax commission, the taxpayer may choose to pay in kind on an estate or any portion thereof which is not liquid. (L. 19, p. 167, § 3185; L. 1935, Chap. 88, § 1, approved March 23, 1935, effective July 1, 1935.)"

"80-12-24

"'Lien of tax.—The tax herein provided for shall be and remain a lien on the property liable therefor from the death of the decedent until paid. (L. 19, p. 167, § 3185.)"

Said Chapter 12, Revised Statutes of Utah 1933, as [fol. 4] amended, provides for no credit against the tax thereby imposed for any tax imposed upon the transfer by any Nation, other State or political subdivision.

9. The defendant Union Pacific Railroad Company claims and asserts that it is unable to determine whether such transfer is subject to said inheritance taxes and asserts that it cannot transfer said shares of stock on its books to the legatees under the will of said decedent or to any assignees of said shares of stock without subjecting itself to suit by the State Tax Commission of Utah for the collection of such inheritance taxes and that it will incur large expenses in defending said suit. Accordingly, the defendant Union Pacific Railroad Company has refused to make any transfer of said shares of stock on its books until a judicial determination has been made as to whether such transfer is subject to said inheritance taxes.

10. The plaintiffs as executors of the will of said decedent have paid to the State of New York a tax upon the transfer of said shares of stock incident to the death of said decedent, based upon the full value thereof, as required by the laws of the State of New York. Section 249-0 of Article 10-C of the Tax Law of the State of New York, in effect on January 29, 1940 but repealed on March 10, 1940, allowed as a credit against the estate tax imposed by said Article the amount of any constitutionally valid estate or inheritance tax paid to any other State within three years after the decedent's death.

The State Tax Commission of New York claims and asserts that an estate or inheritance tax imposed by another state upon shares of stock of a corporation incorporated therein forming a part of the estate of a decedent domiciled in the State of New York is not a constitutionally valid tax and that no credit for the amount of any such tax is allowable against the estate tax payable to the State of New York.

11. The plaintiffs allege and assert that the transfer of said shares of stock incident to the death of said decedent is

not subject to the inheritance taxes imposed by said Chapter 12 as amended, or to any inheritance taxes of the State of Utah, and that said shares of stock are not subject to any lien securing the payment of any such inheritance taxes. Plaintiffs further assert and allege that the decedent, at the time of his death, did not own or have any interest in any property located in the State of Utah and that said shares of stock were never at any time located or had any [fol. 5] situs in the State of Utah and that the State of Utah has no power or jurisdiction to levy or assess or collect any inheritance taxes upon said shares of stock or the transfer thereof incident to the death of said decedent.

12. Plaintiffs further assert and allege that said Chapter 12 as amended is unconstitutional and void as applied to the transfer of said shares of stock incident to the death of said decedent and that the enforcement of said chapter as amended will deprive the plaintiffs and the beneficial owners of said stock of their rights and property therein without due process of law and will deprive them of equal protection of the laws, all contrary to the provisions of Sections 7 and 24 of Article I of the Constitution of the State of Utah and of the Fourteenth Amendment to the Constitution of the United States of America.

13. Plaintiffs further allege that it is necessary to determine and settle the controversy existing between them and the defendants with respect to the constitutionality of said Chapter 12 as amended as applied to the transfer of said shares of stock incident to the death of said decedent to enable the plaintiffs to perform and discharge their duties as executors of the will of said decedent and to administer said stock and to collect and receive the dividends to become due thereon and to transfer the same to the legatees under the will of said decedent or to such other persons as may become entitled thereto in the course of administration of said decedent's estate.

Wherefore, plaintiffs pray for judgment and decree as hereinafter stated.

Second Cause of Action

For a further and additional cause of action against defendants and each of them plaintiffs allege:

1. Plaintiffs reallege paragraphs 1 to 8 inclusive and paragraph 10 of the first cause of action.

2. The defendant State Tax Commission has notified the defendant Union Pacific Railroad Company that the transfer of said shares of stock by the death of said decedent is subject to the inheritance tax imposed by said Chapter 12, as amended, and that said shares of stock are subject to a lien securing payment of such taxes and has notified and [fol. 6] directed the defendant Union Pacific Railroad Company not to transfer said shares of stock on its books when requested so to do by the plaintiffs, by their assignees, or by the beneficial owners of said stock.

3. Prior to the commencement of this action the plaintiffs presented to said defendant Union Pacific Railroad Company at its transfer office in the State of New York the certificates representing said shares of stock, duly endorsed, and requested said Railroad Company to transfer said shares of stock on its books to the persons designated by the plaintiffs but said defendant Railroad Company has refused and still refuses to do so and has notified plaintiffs that it will continue to refuse until it is finally determined by a binding decree of court that the transfer of said stock incident to the death of said decedent is not subject to any inheritance taxes mentioned in said Chapter 12, as amended.

4. The transfer of said shares of stock incident to the death of said decedent is not subject to any inheritance tax imposed by said Chapter 12 as amended, or to any inheritance taxes of the State of Utah, and is not subject to any lien to secure the payment of such taxes. The State of Utah and the State Tax Commission of Utah are without power or jurisdiction to levy or assess or collect any inheritance tax upon the transfer of said shares of stock incident to the death of said decedent. Said Chapter 12, as amended, as applied to such transfer of said shares of stock, is unconstitutional and in conflict with the provisions of Sections 7 and 24 of Article I of the Constitution of the State of Utah and of the Fourteenth Amendment to the Constitution of the United States of America. Enforcement of said Chapter 12, as amended, with respect to the transfer of said shares of stock by the death of said decedent, will deprive the plaintiffs and the beneficial owners of said stock of their rights and property therein without due process of law and will deny them equal protection of the laws, all in violation of said provisions of the Constitution

of the State of Utah and of the Fourteenth Amendment to the Constitution of the United States of America.

5. The refusal of said defendant Railroad Company to transfer said shares of stock on its books as requested by [fol. 7] the plaintiff and the claims and assertions of a lien on said stock claimed and made by the defendant State Tax Commission have rendered it impossible for the plaintiffs to sell or dispose of said shares of stock or to manage, control or administer them as required by the will of said decedent.

Wherefore plaintiffs pray for judgment and decree as follows:

On their first cause of action a declaratory judgment:

(a) That the transfer of the shares of stock above set forth incident to the death of said decedent is not subject to taxation by the State of Utah or the State Tax Commission of Utah under the provisions of said Chapter 12, Revised Laws of Utah 1933, as amended, or at all;

(b) That said Chapter 12, as amended, as applied to said transfer of said shares of stock, is unconstitutional and void and in conflict with the provisions of the Constitution of the State of Utah and of the Fourteenth Amendment to the Constitution of the United States of America;

(c) That said shares of stock are not subject to any lien or other charge in favor of the State of Utah or the State Tax Commission of Utah to secure the payment of any tax herein mentioned;

(d) That it is the duty of said defendant Union Pacific Railroad Company to transfer said shares of stock on its books to the person or persons requested by the plaintiffs without the payment of any tax herein mentioned or the presentation to it of any waiver of such tax by the State Tax Commission of Utah.

On their second cause of action a decree:

(a) Commanding and requiring the defendant Union Pacific Railroad Company to transfer on its books said shares of stock to the person or persons requested by the plaintiffs without the payment of any tax herein mentioned or the

presentation to it of any waiver of such tax by the State Tax Commission of Utah.

(b) Enjoining and restraining said defendant State Tax Commission of Utah from asserting any lien upon said shares of stock as security for the payment of any inheritance taxes and enjoining and restraining said Tax Commis-[fol. 8] sion of Utah from collecting or attempting to collect any of the inheritance taxes mentioned in said Chapter 12, as amended, upon the transfer of said shares of stock incident to the death of said decedent;

(c) Quieting and confirming the plaintiffs' title to said shares of stock against the asserted claim of lien made by the defendant State Tax Commission of Utah.

Plaintiffs pray for such other and further relief as may be proper in the premises and for their costs incurred herein.

(Signed) Sage, Gray, Todd and Sims, Van Cott, Riter and Farnsworth, Attorneys for Plaintiffs.

Duly sworn to by Malcolm P. Aldrich. Jurat omitted in printing.

[fol. 9] IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY

[Title omitted]

ANSWER OF THE STATE TAX COMMISSION OF UTAH—October 21, 1940

Comes now the defendant, the State Tax Commission of Utah, above named, and answers the complaint filed herein as follows:

First Cause of Action

I

Admits the allegations contained in Paragraphs 1, 2, 3, 4, 6, 7, 8, 9, and 13.

II

As to the allegations contained in Paragraph 5, the State Tax Commission admits the allegations contained in the first complete paragraph of Paragraph 5; admits the allega-

tions contained in the second complete paragraph of Paragraph 5, subject, however, to the reservation and contention that said allegations are wholly immaterial and irrelevant to the issues in this cause; admits the allegations contained in the first sentence of the third complete paragraph in Paragraph 5, subject, however, to the reservation and contention that said allegations are wholly immaterial and irrelevant to the issues in this cause; denies the allegations contained in the second sentence of the third complete paragraph in Paragraph 5 and alleges that although the Union Pacific Railroad Company at the present time and for many years past has kept its stock books and records in New York City and its Transfer Agent has been and now is located in New York City, nevertheless, the Union Pacific Railroad Company has the power and ability to transfer the [fol. 10] shares of stock upon the books of the corporation within the State of Utah, and to maintain its books and records with reference to transfer of shares of stock within the State of Utah; admits the remainder of the allegations contained in Paragraph 5, subject, however, to the reservation and contention that said allegations are wholly immaterial and irrelevant to the issues in this cause.

III

Admits the allegations contained in the first complete paragraph of Paragraph numbered 10; admits the allegations contained in the second complete paragraph in Paragraph numbered 10, subject, however to the reservation and contention that said allegations are wholly immaterial and irrelevant to the issues in this cause.

IV

Denies each and every allegation contained in Paragraphs 11 and 12.

V

Defendant State Tax Commission alleges that the transfer of the shares of stock in the Union Pacific Railroad Company owned by the above-named decedent as of the date of death, to wit, 10,000 shares of common stock and 400 shares of preferred stock, is subject to the inheritance tax as provided by Chapter 12, Title 80, Revised Statutes of Utah, 1933, as amended; that the total gross value of said shares of stock as of the date of death of the above-named decedent amounted to $971,500.00; that the total gross value

of the estate of the above named decedent, wherever situated, as of the date of death was $90,000,000.00; that the total amount of indebtedness for which the above-named decedent has been adjudged liable as of the date of his death was $3,000,000.00; that, therefore, in accordance with the provisions of Chapter 12, Title 80, Revised Statutes of Utah, 1933, as amended, and particularly in conformance with the provisions of Section 80-12-9, Revised Stat-es of Utah, 1933, the tax upon the transfer of said shares of stock in the Union Pacific Railroad Company owned by the above named decedent as of the date of death amounts to $88,361.68.

Second Cause of Action

I

Defendant State Tax Commission makes the same answer to Paragraphs 1 to 8, inclusive, and Paragraph 10 of the First Cause of Action, as realleged in the Second Cause of Action, as heretofore made to said allegations in its answer to the First Cause of Action.

[fol. 11]

II

Defendant State Tax Commission admits the allegations contained in Paragraphs 2 and 3.

III

Defendant State Tax Commission denies each and every allegation contained in Paragraph 4.

IV

Defendant State Tax Commission denies the allegations contained in Paragraph 5 and alleges that the refusal of the Union Pacific Railroad Company to transfer said shares of stock on its books, and the claims and assertions of a lien on said stock claimed and made by the State Tax Commission have rendered it impossible for plaintiffs to sell or dispose of said shares of stock or to manage, control or administer them as required by the will of said decedent without first paying the tax claimed by the defendant State Tax Commission for and on behalf of the State of Utah, or without first having a judicial determination of the existing controversy.

V

Defendant State Tax Commission alleges that the transfer of the shares of stock in the Union Pacific Railroad

Company owned by the above-named decedent as of the date of death, to wit 10,000 shares of common stock and 400 shares of preferred stock, is subject to the inheritance tax as provided by Chapter 12, Title 80, Revised Statutes of Utah, 1933, as amended; that the total gross value of said shares of stock as of the date of death of the above-named decedent amounted to $971,500.00; that the total gross value of the estate of the above named decedent, wherever situated, as of the date of death was $90,000,000.00; that the total amount of indebtedness for which the above-named decedent has been adjudged liable as of the date of his death was $3,000,000.00; that, therefore, in accordance with the provisions of Chapter 12, Title 80, Revised Statutes of Utah, 1933, as amended, and particularly in conformance with the provisions of Section 80-12-9, Revised Statutes of Utah, 1933, the tax upon the transfer of said shares of stock in the Union Pacific Railroad Company owned by the above named decedent as of the date of death amounts to $88,361.68.

[fol. 12] Wherefore, This Defendant Prays: (1) For Judgment determining and deciding the issues formed by the complaint and this answer; (2) For judgment and decree that the transfer of the shares of stock above referred to is subject to taxation by the State of Utah under the provisions of Chapter 12, Title 80, Revised Statutes of Utah, 1933, as amended; (3) For judgment and decree against the above plaintiffs as administrators with the will annexed of the estate of Edward S. Harkness, deceased, in the amount of $88,361.68 being the amount of inheritance tax liability due to the State of Utah from the above-entitled estate upon the transfer of said stock; (4) For a judgment and decree declaring a lien upon said shares of stock in favor of the State of Utah to secure the payment of the inheritance tax liability of the above-entitled estate to the State of Utah; (5) and for such other and further relief as to this Honorable Court may seem just and meet in the premises.

Dated this 21st day of October, A. D., 1940.

(Signed) Irwin Arnovitz, Garfield O. Anderson, Attorneys for State Tax Commission.

Duly sworn to by Kline P. Barney. Jurat omitted in printing.

Received copy of the above and foregoing Answer this 21st day of October, A. D., 1940.

(Signed) Van Cott, Riter and Farnsworth, Attorneys for Plaintiffs.

[fol. 13] IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF SALT LAKE

[Title omitted]

ANSWER OF UNION PACIFIC RAILROAD COMPANY

Comes now the defendant above named, Union Pacific Railroad Company, a corporation, and answers the complaint as follows:

First Cause of Action

1. Admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 13.

2. Answering paragraphs 11 and 12, defendant Union Pacific Railroad Company admits the matters of fact therein alleged, but as to the matters of law alleges that they have not been determined by the courts and upon that ground denies the same.

Second Cause of Action

1. Admits the allegations contained in paragraphs 1, 2, 3 and 5.

2. Answering paragraph 4, defendant Union Pacific Railroad Company admits the matters of fact therein alleged, but as to the matters of law alleges that they have not been determined by the courts and upon that ground denies the same.

Wherefore this defendant prays for judgment determining and deciding the issues formed by the complaint and this answer.

(Signed) Geo. H. Smith, W. Hal Farr, Robt. B. Porter, Attorneys for Defendant, Union Pacific Railroad Company.

[fol. 14] Received copy of the foregoing answer this 11th day of October, 1940, and verification thereof is hereby waived.

(Signed) Sage, Gray, Todd & Sims, Van Cott, Riter and Farnsworth, Attorneys for Plaintiffs.

[fol. 15] IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF SALT LAKE

[Title omitted]

REPLY

Come now the plaintiffs above named and reply to the answer of State Tax Commission of Utah as follows:

1. Replying to paragraph V of the answer to the first and second causes of action admits that the total gross value of the estate of the above named decedent, wherever situated, as of the date of his death, was $90,000,000.00 and that the total amount of indebtedness of the above named decedent as of the date of his death was $3,000,000.00. Denies each and every other allegation therein contained.

Wherefore, plaintiffs pray as set forth in their complaint.

(Signed) Sage, Gray, Todd and Sims, Van Cott, Riter and Farnsworth, Attorneys for Plaintiffs.

Received copy of the foregoing reply this 23 day of October, 1940 and verification thereof is hereby waived.

(Signed) Irwin Arnovitz (per G. O. A.), Garfield O. Anderson, Attorneys for Defendant, State Tax Commission of Utah.

[fol. 16] IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF SALT LAKE

[Title omitted]

STIPULATION OF FACTS—October 31, 1940

The parties hereby stipulate:

First

In the third paragraph of Section 5 on page 2 of the complaint appear the following allegations:

"The shares of stock of said Railroad Company are not, and for many years have not been, transferable upon the books of the Company within the State of Utah."

The answer of the State Tax Commission of Utah responds to this allegation as follows:

"* * * denies the allegations contained in the second sentence of the third complete paragraph in Paragraph 5 and alleges that although the Union Pacific Railroad Company at the present time and for many years past has kept its stock books and records in New York City and its Transfer Agent has been and now is located in New York City, nevertheless, the Union Pacific Railroad Company has the power and ability to transfer the shares of stock upon the books of the corporation within the State of Utah, and to maintain its books and records with reference to transfer of shares of stock within the State of Utah;—"

In regard to these pleadings the parties hereby stipulate that the Union Pacific Railroad Company for many years has kept its stock books and records and transfer agents in New York City and has not had any such in Utah; but that Union Pacific Railroad Company could transfer shares of stock within the State of Utah and could maintain books and records with reference to transfer of shares of stock within the State of Utah.

[fol. 17] Second

State Tax Commission of Utah, in paragraph IV of its answer, denies each and every allegation contained in paragraphs 11 and 12, including the allegation reading as follows:

"* * * Plaintiffs further assert and allege that the decedent, at the time of his death, did not own or have any interest in any property located in the State of Utah and that said shares of stock were never at any time located or had any situs in the State of Utah—."

State Tax Commission of Utah by this denial does not intend to impair its admission of the allegations of Section 7 of the complaint. State Tax Commission of Utah by its denial of the allegation in question contends that the ownership by the decedent of stock in a Utah corporation is the ownership of property or an interest in property located in the State of Utah or having a taxable situs in the State of Utah and that by reason of the fact that Union Pacific Railroad Company was incorporated in Utah shares of stock therein have a location and a situs in the State of Utah.

Third

In Section 5 of the answer of State Tax Commission of Utah to the first cause of action and in Section 5 of its answer to the second cause of action there are affirmative allegations respecting the amounts involved in the computation of the inheritance tax alleged to be owing, some of which are denied by the plaintiff's reply. The issues thus raised do not need to be determined unless and until it is decided that the State of Utah can collect the tax in question. The parties therefore stipulate that the determination of this question shall await the determination of the question of whether the tax can be collected and that if it is finally decided that the tax can be collected the parties will submit to the jurisdiction of this court for the purpose of determining the question described.

Fourth

The case is submitted for the decision and judgment of the court upon the complaint, answers, reply and the foregoing stipulations.

Dated October 31, 1940.

(Signed) Sage, Gray, Todd and Sims, Van Cott, Riter and Farnsworth, Attorneys for Plaintiffs.

(Signed) Irwin Arnovitz, Garfield O. Anderson, Attorneys for Defendant, State Tax Commission of Utah. (Signed) Geo. H. Smith, Robt. B. Porter, W. Hal Farr, Attorneys for Defendant, Union Pacific Railroad Company.

[fol. 18] In the Third Judicial District Court in and for Salt Lake County

Malcolm P. Aldrich and Mary S. Harkness, Administrators with the Will Annexed of the Estate of Edward S. Harkness, Deceased, Plaintiffs,

vs.

State Tax Commission of Utah and Union Pacific Railroad Company, a Corporation, Defendants

Memorandum of Decision—January 23, 1941

This court is bound by the decision of the United States Supreme Court in First National Bank v. Maine, 76 L. Ed., 313, 284 U. S. 312. It is true that before that decision sev-

eral of the states had decided the question, as to whether shares of stock owned by a non-resident deceden' were properly subject to a succession tax by states where the corporation was incorporated, in the affirmative. In this state, in the case of Larson v. MacMiller, et al., 56 Utah 84, decided in 1920, while that precise question was not before the court, it appears that the defendant executors conceded the right of the State of Utah to tax such stock. However, since in First National Bank v. Maine, Supra, a federal question was involved, and since that question was decided by the Supreme Court of the United States, the courts of the several states are bound by that decision, until and unless the Supreme Court of the United States shall reach a different conclusion than that reached therein. Matter of Lagergreit, 276 N. Y., 184, 11 N. E. (2d) 722.

Judgment is, therefore, for the plaintiffs and against the defendants in accordance with the prayer of the complaint, and the stipulation of the parties, and counsel for plaintiffs is directed to prepare such decree accordingly and serve the same upon counsel for the defendants.

Dated Jan. 22, 1941.

(Signed) Clarence E. Baker, District Judge.

[fol. 19] In Third Judicial District Court in and for the County of Salt Lake

[Title omitted]

Stipulation Waiving Findings of Fact and Conclusions of Law and for Entry of Judgment—February 21, 1941

The parties hereby stipulate that Findings of Fact and Conclusions of Law are waived and the court may make and enter its Declaratory Judgment and Decree forthwith.

Dated February 21, 1941.

(Signed) Melber Chambers, W. Q. Van Cott, Attorneys for Plaintiff. (Signed) Irwin Arnovitz, Garfield O. Anderson, Attorneys for Defendant State Tax Commission of Utah. (Signed) Geo. H. Smith, Attorney for Defendant Union Pacific Railroad Company.

[fol. 20] IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF UTAH IN AND FOR THE COUNTY OF SALT LAKE

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the Will Annexed of the Estate of Edward S. Harkness, Deceased, Plaintiffs,

vs.

STATE TAX COMMISSION OF UTAH and UNION PACIFIC RAILROAD COMPANY, a Corporation, Defendants

DECLARATORY JUDGMENT AND DECREE—March 24, 1941

This case came on duly for hearing October 31, 1940. Messrs. Melber Chambers of New York City and W. Q. Van Cott of Salt Lake City appeared for plaintiffs. Messrs. Irwin Arnovitz and Garfield O. Anderson of Salt Lake City appeared for defendant State Tax Commission of Utah. Mr. George H. Smith of Salt Lake City appeared for defendant Union Pacific Railroad Company. A written stipulation by all of the parties in regard to pleadings and providing for the submission of the case for decision upon the complaint, answers of defendants, reply and said stipulation was presented and pursuant to motion of all parties was ordered filed as supplementing the pleadings herein and to be made part of the judgment roll. All parties represented to the court that the only issue of fact raised by the pleadings is by virtue of the allegations contained in paragraphs V of the answer of the State Tax Commission of Utah to the first and second causes of action which alleges that the total gross value of the shares of Union Pacific stock described in the complaint as of the date of the death of the decedent was $971,500.00, which allegations are denied by the reply; that such issue should not be tried unless and until it is finally decided that the tax in question can be imposed and collected by the State of Utah; and that if it is finally so decided that this court will have continuing jurisdiction to try and determine such issue.

The parties having filed a written stipulation waiving [fol. 21] findings of fact and conclusions of law and the court being fully advised, the court hereby adjudges and decrees as follows:

For the Declaratory Judgment of the court it is hereby Adjudged:

(a) The transfer of shares of stock, set forth in the complaint, incident to the death of the decedent Edward S.

Harkness is not subject to taxation by the State of Utah or the State Tax Commission of Utah under the provisions of Section 80-12-2 Revised Statutes of Utah, 1933, as amended by Chapter 88, Laws of Utah, 1935, or at all;

(b) Said Section 80-12-2, as amended, as applied to said transfer of said shares of stock, is unconstitutional and void and in conflict with the provisions of Sections 7 and 24 of Article I of the Constitution of the State of Utah and of the Fourteenth Amendment to the Constitution of the United States of America;

(c) Said shares of stock are not subject to any lien or other charge in favor of the State of Utah or the State Tax Commission of Utah to secure payment of any estate, inheritance or transfer tax;

(d) It is the duty of defendant Union Pacific Railroad Company to transfer said shares of stock on its books to the person or persons requested by plaintiffs without the payment of any estate, inheritance or transfer tax or the presentation to it of any waiver of such tax by the said Tax Commission of Utah.

And the court hereby Decrees:

(a) Defendant Union Pacific Railroad Company is hereby commanded and required to transfer on its books the shares of stock described in the complaint to the person or persons designated by plaintiffs without the payment of any estate, inheritance or transfer tax or the presentation to it of any waiver of such tax by the State Tax Commission of Utah.

(b) The defendant State Tax Commission is enjoined and restrained from asserting any lien upon the shares of stock described in the complaint as security for the payment of any estate, inheritance or transfer taxes and is enjoined and restrained from collecting or attempting to collect any inheritance taxes provided for in Section 80-12-2, as amended, upon the transfer of said shares of stock, de- [fol. 22] scribed in the complaint, incident to the death of the decedent, Edward S. Harkness.

(c) Plaintiffs' title to the shares of stock described in the complaint is hereby quieted and confirmed against the as-

serted claim of lien made by defendant State Tax Commission of Utah.

Done in Open Court this 24th day of March, 1941.

(Signed) Clarence E. Baker, Judge.

Attest: William J. Korth, Clerk, by (Signed) C. L. Countryman, Deputy Clerk.

[fol. 23] IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

[Title omitted]

NOTICE OF APPEAL—April 1, 1941

To the Clerk of the Above-Entitled Court, To Malcolm P. Aldrich and Mary S. Harkness, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased, And to Van Cott, Riter and Farnsworth, Their Attorneys:

You and each of you will please take notice that the State Tax Commission of the State of Utah, defendant in the above-entitled cause, hereby appeals to the Supreme Court of the State of Utah from that certain Declaratory Judgment and Decree entered in the above-entitled court and cause on the 24th day of March, 1941, in favor of the plaintiffs and against the State Tax Commission, and from the whole thereof.

Dated this 1st day of April, A. D., 1941.

(Signed) Garfield O. Anderson, Grant A. Brown, Attorneys for State Tax Commission.

Received a copy of the foregoing Notice of Appeal this 1st day of April, A. D., 1941.

(Signed) Van Cott, Riter & Farnsworth (a), Attorneys for Plaintiffs.

[fol. 24] IN SUPREME COURT OF UTAH

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased, Plaintiffs,

v.

STATE TAX COMMISSION OF UTAH and UNION PACIFIC RAILROAD COMPANY, a Corporation, Defendants

STATEMENT OF ERRORS

In the Harkness case, number 6358, appellant assigns the following errors upon which it relies for a reversal of the judgment of the court below:

I

That the trial court erred in making and entering its declaratory judgment and decree, dated March 24, 1941 (R. 31-33), in favor of the plaintiff and against the defendant for the reason that the same is contrary to law.

II

That the trial court erred in making and rendering its declaratory judgment and decree, dated March 24, 1941 (R. 31-33), for the reason that the whole and every part thereof is erroneous and contrary to law.

[fol. 25] IN SUPREME COURT OF UTAH

No. 6358

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased, Plaintiffs and Respondents,

v.

THE STATE TAX COMMISSION OF UTAH, Defendant and Appellant,

UNION PACIFIC RAILROAD COMPANY, Defendant

OPINION

LARSON, *Justice:*

Plaintiffs in the District Court sought a declaratory judgment holding that the transfer of stock in the Union Pacific Railroad Company, a Utah corporation, owned by Edward

S. Harkness at the time of his death be held not subject to tax by the State of Utah under the provisions of Chapter 12, Title 80, R. S. U. 1933, commonly called the Inheritance Tax. The trial court entered judgment for plaintiffs as prayed for and the defendant, State Tax Commission, appeals.

The facts were these: Edward S. Harkness died January 29, 1940, being at the time of his death domiciled in the State of New York. His estate was probated in the New York courts where plaintiffs were appointed executors of the last will and testament of the decedent. Plaintiffs were also appointed administrators with the will annexed of the estate of decedent on August 28, 1940 by the District Court of Salt Lake County, State of Utah, and are now acting in that capacity.

At the time of his death Harkness was the owner of 10,000 shares of common stock and 400 shares of preferred stock of the Union Pacific Railroad Company, a Utah corporation. The certificates representing these shares of stock were in the possession of the decedent in the State of New York, and the same certificates are now located physically in the State of New York in the possession of plaintiffs as executors of the estate of the decedent. As of the date of death these shares of stock were recorded on the books of the Union Pacific Railroad Company in the name of Edward S. Harkness. This stock, which the State Tax Commission contends is subject to tax under our Inheritance Tax Law, is the only property owned by decedent claimed to be within the jurisdiction of the State of Utah.

At the date of Mr. Harkness' death, the laws of the State of New York allowed as a credit against the estate tax imposed by the State of New York the amount of any constitutionally valid estate or inheritance tax paid to any other state within three years after the decedent's death.

The fundamental question involved in the case is stated thus: Is the transfer of stock in a corporation organized and existing under and by virtue of the laws of the State of Utah, which stock was owned by a non-resident decedent, (the certificates thereof being acquired and held outside of the State of Utah), taxable by the State of Utah under Chap-

ter 12, Title 80, R. S. U. 1933? The material portions of these sections read as follows:

80-12-2:

"A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, whether a resident or nonresident of this state • • •"

80-12-3:

"The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, within the jurisdiction of [fol. 25a] this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any other state or country, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death."

For many years taxes were collected in such cases by this and several other states. In January, 1932, the Supreme Court of the United States in First National Bank of Boston v. Maine, 284 U. S. 312, 76 L. ed. 313, 52 Sup. Ct. Rep. 174, held that shares of stocks were subject to inheritance taxes in the state of the owner's domicile and attempts to impose death duty taxes upon stocks in states other than that of the owner's domicile were void under the due process clause of the Fourteenth Amendment to the Federal Constitution. Since that decision such taxes have not been collected and it is frankly conceded that if the rule announced in that case still controls as the law, the attempt to collect the death duty taxes here involved must fail. Appellant, State Tax Commission in its brief states its position thus:

"• • • The only bar, if there be a bar at all, to the State of Utah's right and power to assess and collect the tax in question, is the Supreme Court's decision in First National Bank of Boston v. Maine.

"Because there is reason to believe that the Supreme Court has now reversed First National Bank of Boston v.

Maine, the Tax Commission is now proceeding to assess and collect the tax provided by Chapter 12, Title 80, Revised Statutes of Utah, 1933, upon all transfers of stock in Utah corporations, whether the same be owned by residents or nonresidents, where the value of the stock and other property within the State of Utah is of such an amount as to bring the estate within the taxable brackets."

Respondent defends the decision of the trial court upon the following grounds: (a) The authority of the First National Bank of Boston v. Maine stands unimpaired and is controlling upon this court; (b) The tax infringes the due process clause of the Constitution of the State of Utah; (c) The shares of stock in question are not property within the jurisdiction of the State of Utah and are consequently not within the terms of the Inheritance Tax statute. Our statute, commonly called the Inheritance Tax Law, was enacted in 1901. Provisions imposing death duty taxes upon the transfer of stock in Utah corporations even though owned by non-resident decedents have remained on the statute books without any substantial change since that time. From the time the statute became effective until the Supreme Court of the United States handed down its decision in First National Bank of Boston v. Maine, 284 U. S. 312, 76 L. Ed. 213, 52 Sup. Ct. Rep. 174, the state construed and applied the statute as including within its tax provisions stock of Utah corporations owned by non-residents. Such application of the statute was never questioned in the courts, all estates coming within the statute as so construed paying the tax without litigation. In only one case was the question here involved even indirectly before this court. In Larson v. McMillar, 56 Utah 84, 189 P. 579 under a state of facts almost identical with those in the present case, the question arose as to the method of computing the tax on the property consisting of stocks in all respects similar to those here involved. The inclusion in the taxable estate of the shares of stock in the Union Pacific Railroad, owned and held in New York by decedent, a resident of that state, was not disputed, and was assumed and recognized and applied by this court in directing a larger judgment in favor of the State Treasurer. After the decision in the case of First National Bank of Boston v. Maine, supra, holding a tax such as that here involved to be in violation of the Fourteenth Amendment to the Federal Constitution, the attor-

ney general who under the statute had been the collector of inheritance or estate taxes ceased, and advised the State Tax Commission as his successor as collector of death duty taxes to cease collecting the taxes on stock in Utah corporations owned by non-residents, because of that decision. It is clear therefore that the only reason the State Tax Commission ceased to insist upon, and to enforce its right to collect such taxes is the decision of the United States Supreme Court in the First National Bank of Boston v. Maine, supra.

Have the later decisions of the United States Supreme [fol. 26] Court, as exemplified by Curry v. McCanless, 307 U. S. 357, 83 L. Ed. 371, 59 Sup. Ct. Rep. 900, overruled the decision in First National Bank of Boston v. Maine, supra? It is true that Mr. Justice Stone, now Chief Justice, in writing the opinion of the court in Curry v. McCanless uses much the same arguments, reasoning, and rationale that he used in the dissenting opinion in the First National Bank of Boston v. Maine case. But the Curry v. McCanless case involved a peculiar trust arrangement, part of the rights of which were situated in each of two states, whereas the First National Bank of Boston v. Maine case involved a tax on corporate stock. In no case, as far as we know, since National Bank v. Maine has the Supreme Court been asked to review or pass upon the question decided in that case. We assume that had the court felt the occasion for overruling or modifying the holding of that case as to taxation of corporate stock under death duty statutes it would not have hesitated to do so in positive language. In the Curry v. McCanless case the court was not unmindful of the First National Bank of Boston v. Maine holding. It referred to the opinion, cited it as authority for what it does hold, and then refused to extend the doctrine there announced as to stocks to cover trusts such as involved in the Curry v. McCanless case. The court said:

"The doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state has received support to the limited extent that it was applied in Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000; Baldwin v. Missouri, 280 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056, 72 A. L. R. 1303; First National Bank v. Maine, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313, 77 A. L. R. 1401. Still more recently this

Court has declined to give it completely logical application. It has never been pressed to the extreme now urged upon us, and we think that neither reason nor authority requires its acceptance in the circumstances of the present case."

It matters not what our personal opinions may be in the matter. The question being one under the federal constitution, the opinion of the Supreme Court of the United States is controlling. It having in the case of First National Bank of Boston v. Maine, supra, declared corporate stock under circumstances such as here involved to be subject to inheritance taxes only in the state of decedent's domicile, we must follow that ruling until the court which announced it shall overrule it.

It follows therefore that the attempt to impose inheritance taxes upon the stocks involved in this action is void as infringing the due process clause of the fourteenth amendment to the federal constitution under the holding in First National Bank of Boston v. Maine. The decision of the trial court is affirmed. Respondents to recover costs.

We Concur:

David W. Moffat, Chief Justice, James H. Wolfe, Justice, Roger I. McDonough, Justice.

CONCURRING OPINION

PRATT, *Justice*: (concurring in result)

I concur in affirming the decision of the lower court. My reasons are these:

Our inheritance tax is a tax upon the exercise of the right to transmit property from a decendent. State Tax Commission v. Backman, 88 Utah 424, 55 P. (2d) 171. In that case this court said that such a right of transmission is a creature of statute; and that the state granting the right may impose conditions upon its exercise. In other words the tax is not upon the exercise of a right granted by another state; but upon the exercise of a right granted by this state.

In the present case, the right of transmission is granted by a state other than Utah; and, not only that, but the exercise of that right occurs in that other state. The successful transmission of decedent's interest in the corporation to the heirs or legatees is not contingent upon any law of this state. Utah has not conferred the benefits of that

right of transmission. It is not inconceivable that the laws of another state may provide a succession different from the laws of Utah. The right of transmission granted by another state is not one and the same thing as that granted by this state.

There may be some value in the shares of stock attributable to the fact that the incorporation of the Union Pacific Railroad is in Utah, and that some of its tangible property is here, but the exercise of the right of transmission of those shares from decedent to the heirs or legatees is not contingent upon value. Our inheritance tax is not a tax upon decedent's property, be that property what it may; and be its value attributable to whatever cause.

Such sections as 80-12-3 (quoted in the prevailing opinion) fix the method of determining the amount of the tax.

[fol. 27] IN SUPREME COURT OF UTAH

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, deceased, Plaintiffs and Respondents,

v.

THE STATE TAX COMMISSION OF UTAH, Defendant and Appellant, UNION PACIFIC RAILROAD COMPANY, Defendant

JUDGMENT—September 17, 1941

This cause having been heretofore argued and submitted, and the court being sufficiently advised in the premises, it is now ordered, adjudged, and decreed that the judgment of the district court herein be, and the same is, affirmed. Respondents to recover costs.

[fol. 28] IN SUPREME COURT OF UTAH

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Oct. 24, 1941

On consideration of the Petition for Rehearing heretofore filed herein and of the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is, denied.

[fol. 29] IN SUPREME COURT OF UTAH

[Title omitted]

PRAECIPE FOR RECORD—October 24, 1941

To Mr. L. M. Cummings, Clerk of The Supreme Court of The State of Utah:

You are hereby requested to make a transcript of the record in the above-entitled cause, to be filed in the Supreme Court of the United States pursuant to a petition for Writ of Certiorari, and to include in such transcript of record as follows:

1. Complaint filed in the Third Judicial District Court of the State of Utah, in and for Salt Lake County.
2. Answer of defendant, State Tax Commission of Utah.
3. Answer of defendant, Union Pacific Railroad Company.
4. Reply of plaintiff to answer of defendant, State Tax Commission of Utah.
5. Stipulation in the Third Judicial District Court in and for Salt Lake County, dated October 31, 1940.
6. Memorandum of decision of the Third Judicial District Court of the State of Utah, in and for Salt Lake County.
7. Stipulation dated February 21, 1941, waiving Findings of Fact and Conclusions of Law.
8. Declaratory judgment and decree of the Third Judicial District Court of the State of Utah, in and for Salt Lake County.
9. Notice of Appeal of State Tax Commission.
10. Statement of errors from Page 5 of Appellant's brief.
[fol. 30] 11. Decision of the Supreme Court of the State of Utah, dated September 17, 1941.
12. Judgment of the Supreme Court of the State of Utah, dated September 17, 1941.
13. Minute entry showing filing of Petition for rehearing.
14. Order of the Supreme Court of the State of Utah denying petition for rehearing.
15. Praecipe for transcript of record.

Said transcript of record is to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States, concerning appeals from decisions of state courts, and to be immediately filed in the

office of the Clerk of the Supreme Court of the United States in Washington, D. C.

Dated this 24th day of October, A. D., 1941.

(Signed) Garfield O. Anderson, J. Lambert Gibson, Counsel for Defendant-appellant.

Service of the above Clerk's praecipe for transcript of record is acknowledged this 24th day of October, 1941, and it is hereby stipulated that the foregoing list may constitute the entire transcript of the record in the above entitled cause to be filed in the Supreme Court of the United States.

(Signed) Van Cott, Riter and Farnsworth, Sage, Gray, Todd & Simms, Counsel for Respondents.

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 12, 1942

The petition herein for a writ of certiorari to the Supreme Court of the State of Utah is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration and decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 24 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 814

THE STATE TAX COMMISSION OF UTAH,
Petitioner,

vs.

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF

J. LAMBERT GIBSON,
GARFIELD O. ANDERSON,
Counsel for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.....

THE STATE TAX COMMISSION OF UTAH,
Petitioner,

vs.

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the State Tax Commission of Utah respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

The petitioner, the State Tax Commission of the State of Utah, is a body politic, created under and by virtue of the constitution and laws of the State of Utah, and is charged with the duty, among other things, of enforcing the provisions of Chapter 12, Title 80, Revised Statutes of Utah, 1933, and of collecting the estate taxes due thereunder (R. 1-2).

Respondents (plaintiffs in this action originally, and hereinafter referred to as plaintiffs) are the duly appointed, qualified and acting administrators with the will annexed of the estate of Edward S. Harkness, deceased (R. 1).

Edward S. Harkness died January 29, 1940, and at the time of his death was a resident of and domiciled in the State of New York (R. 1). At date of death Edward S. Harkness was the owner of 10,000 shares of the common stock and 400 shares of the preferred stock of the Union Pacific Railroad Company (R. 2-3). The certificates representing these shares of stock were in the possession of the decedent in the State of New York and the same certificates are now physically located in the State of New York in the possession of the plaintiffs as executors of the estate of said decedent (R. 3). The shares of stock were recorded on the books of the Union Pacific Railroad Company in the name of Edward S. Harkness at the date of his death (R. 3). Other than the ownership of the stock in question, the transfer of which the State Tax Commission of Utah claims as subject to tax under Chapter 12, Title 80, Revised Statutes of Utah, 1933, the decedent owned no property within the jurisdiction of the State of Utah.

The Union Pacific Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Utah (R. 2).

At the date of Mr. Harkness' death the laws of the State of New York allowed as a credit against the estate tax imposed by the State of New York the amount of any constitutionally valid estate or inheritance tax paid to any other state within three years after the decedent's death (R. 4).

The State Tax Commission of Utah claims and asserts that the transfer at death of said shares of stock of the Union Pacific Railroad Company from said decedent is subject to tax under Chapter 12, Title 80, Revised Statutes of Utah, 1933, and has demanded payment of said tax

as a condition precedent to the transfer of said shares of stock from the decedent's name to such beneficiaries as may be entitled thereto under the terms of the decedent's will.

On October 4, 1940, plaintiffs filed an action in the Third Judicial District Court of the State of Utah, in and for the County of Salt Lake, asking for a declaratory judgment to the effect that the transfer of such shares of stock was not subject to the Utah estate tax and requesting an injunction against the State Tax Commission restraining and prohibiting the Commission from asserting any tax liability upon such transfer (R. 1-8). The allegations of plaintiffs' complaint include averments to the effect that the imposition of such a transfer tax by the State of Utah would violate the Fourteenth Amendment to the Constitution of the United States of America. This was the earliest opportunity at which a federal question could be raised (R. 5, 6, 7). The cause was submitted to the trial court and on January 22, 1941, the trial court rendered its memorandum decision in favor of plaintiffs and against petitioner (R. 15-16). On March 24, 1941, declaratory judgment and decree, as prayed, was entered by the trial court (R. 17-19). One of the grounds of said decision of the trial court was that the imposition of the tax contended for by petitioners would violate the Fourteenth Amendment to the Constitution of the United States of America. Appeal was duly taken to the Supreme Court of the State of Utah (R. 19) and on September 17, 1941, the Supreme Court of the State of Utah rendered its decision affirming that of the trial court (R. 20-26). (Utah, 116 Pac. (2d) 923.) Judgment of the Supreme Court of the State of Utah in accord with said decision was entered September 17, 1941 (R. 26).

The decision and judgment of the Supreme Court of the State of Utah were based solely upon the principle that the proposed imposition of the tax under the facts of the case at bar would violate the provisions of the Fourteenth Amendment to the Constitution of the United States of America.

Petition for rehearing was duly and timely made to the Supreme Court of the State of Utah on the 14th day of October, 1941, and was denied by that court on the 24th day of October, 1941 (R. 26).

This petition is for a review of the decision and judgment of the Supreme Court of the State of Utah. Said judgment of the Supreme Court of the State of Utah is a final judgment of the highest court of the State of Utah in which a decision could be had.

II.

JURISDICTION

1. The date of the judgment to be reviewed was September 17, 1941 (R. 26). The date of the order denying petition for rehearing was October 24, 1941 (R. 26).

2. The Supreme Court of the State of Utah is the highest court of law and equity in the State of Utah and the judgment or decree sought to be reviewed and reversed is a final judgment or decree of the Supreme Court of the State of Utah.

3. The Supreme Court of the State of Utah has decided a federal question of substance in a way not in accord with applicable decisions of this Court and has held the application of a statute of the State of Utah invalid on the grounds of its being repugnant to the Constitution of the United States of America. (Judicial Code, Section 237, as amended; 28 U.S.C.A., Section 344.)

4. The statute of the State of Utah involved is found in the volume entitled Revised Statutes of Utah, 1933, at page 920, Sections 80-12-2 and 80-12-3, and provides as follows:

Section 80-12-2:

> "A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, whether a resident or non-resident of this state: * * *."

Section 80-12-3:

"The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any other state or country, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death."

5. The entire record is before this Honorable Court on this petition for writ of certiorari which is made within the time limit prescribed by statute and the rules of this Court.

III.

QUESTION PRESENTED

The question presented in this action is whether the State of Utah may, without violation of the Constitution of the United States of America, levy and collect its estate tax upon the transfer at death of shares of stock in domestic Utah corporations, which stock was, at the time of death, owned by a decedent nonresident of and not domiciled in the State of Utah.

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Petitioner respectfully presents that the Supreme Court of the State of Utah has erroneously decided a federal question of substance in a way not in accord with applicable decisions of this Court, in that the Supreme Court of the State of Utah has held in a final judgment that the State of Utah is barred by the provisions of the Fourteenth Amendment to the Constitution of the United States of America from assessing and collecting its estate tax upon the transfer at death of shares of stock in domestic

Utah corporations owned by nonresident decedents at the time of death. Recent decisions of this Honorable Court have demonstrated that a tax under such circumstances is not violative of any provision of the Constitution of the United States of America. *Curry* v. *McCanless*, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900; *Graves* v. *Elliott*, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913; and other decisions treated in petitioner's brief in support of this petition for writ of certiorari.

2. The Supreme Court of the State of Utah has, by the decision herein referred to, held that a statute of the State of Utah is invalid in its application to the facts of the case at bar upon the ground that the statute was repugnant to the Constitution of the United States of America, and in so holding has misconstrued the Constitution of the United States of America and the applicable decisions of this Court.

3. The question of whether the state of incorporation may tax the transfer at death of shares of stock of domestic corporations owned by nonresident decedents at date of death is one of general importance and concern to the several states and to taxpayers. The question should be decided by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Utah, commanding the said Supreme Court of the State of Utah to certify and to send to this Court on the day certain to be therein named a full and complete transcript of the record and all proceedings in the case entitled and numbered on the docket of the Supreme Court of the State of Utah: "Malcolm P. Aldrich and Mary S. Harkness, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased, Plaintiffs and Respondents, vs. State Tax Commission of the State of Utah, Defendant and Appellant, No. 6358", to the end that said case may be reviewed and determined by this

Court; as provided by law, that the judgment of the Supreme Court of the State of Utah in said cause be reversed by this Honorable Court, and that your petitioner have such other and further relief as to this Honorable Court may seem just and proper; and your petitioner will ever pray.

STATE TAX COMMISSION OF UTAH

J. LAMBERT GIBSON,
GARFIELD O. ANDERSON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURTS BELOW

The trial court rendered its decision on January 22, 1941 (R. 15-16) but the opinion is unreported. The opinion of the Supreme Court of the State of Utah (R. 20-26) is reported at ——Utah——, 116 Pac. (2d) 923.

STATEMENT OF THE CASE

The facts of the case are set forth in the petition herein (see pages 1-4).

JURISDICTION

The judgment of the Supreme Court of the State of Utah herein sought to be reviewed was entered on September 17, 1941 (R. 26). Petition for rehearing was denied by the Supreme Court of the State of Utah on October 24, 1941 (R. 26). The judgment of the Supreme Court of the State of Utah was rendered in a cause in which the validity, under the Fourteenth Amendment to the Constitution of the United States, of Sections 80-12-2 and 80-12-3, Revised Statutes of Utah, 1933, was directly involved.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 937 (28 U.S.C.A., Sec. 344) and the Act of February 13, 1925, c. 229, Sec. 8, 43 Stat. 940 (28 U.S.C.A., Sec. 350).

STATEMENT OF ERRORS

1. The Supreme Court of the State of Utah erred in applying the principles established by this Court in applicable decisions to the facts in this cause.

2. The Supreme Court of the State of Utah erred in its application of the Fourteenth Amendment to the Constitution of the United States to the facts in this cause.

3. The Supreme Court of the State of Utah erred in holding that the imposition of the Utah estate tax upon the transfer of shares of stock of domestic corporations of the State of Utah owned by nonresident decedents was in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Utah erred in not holding that Chapter 12, Title 80, Revised Statutes of Utah, 1933, as herein sought to be applied was valid.

ARGUMENT

I.

The Law Prior to First National Bank of Boston v. Maine

Chapter 12, Title 80, Revised Statutes of Utah, 1933,[1] commonly called the Utah Inheritance Tax Law, in reality imposes an estate tax upon the transfer of the net estate of a decedent. *State Tax Commission* v. *Backman,* (1936) 88 Utah 424, 55 Pac. (2d) 171.

The gross estate, from which, after allowance of certain deductions, the net estate is derived, includes "all property * * * within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person * * * by testamentary disposition or by law of inheritance or succession of this *or any other state or country* * * *". (Section 80-12-3, Revised Statutes of Utah, 1933.) The tax is placed upon "the transfer of the net estate of every decedent, *whether a resident or nonresident of this state.*" (Section 80-12-2, Revised Statutes of Utah, 1933.) (Italics ours.)

Prior to the decision of this Court in *First National Bank of Boston* v. *Maine,* (1932) 284 U. S. 312, 76 L. ed. 313, 52 S. Ct. 174, the State of Utah levied and collected its estate tax upon the transfer of stock in Utah corporations whether owned by resident or nonresident decedents. *Larson* v. *MacMiller,* (1920) 56 Utah 84, 189 Pac. 579; see also the decision of the Supreme Court of Utah in the instant case, 116 Pac. (2d) 923.

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[1] See Appendix A.

The statutory provisions under which such transfers were taxed by the State of Utah prior to the First National Bank case have remained unchanged to the present time so far as material to the question herein presented (see decision in instant case, 116 Pac. (2d) 923) and are intended to tax transfers such as those in the case at bar if such tax be not violative of the Constitution of the United States.

The position of the State of Utah in so taxing such transfers was in complete harmony with the unanimous decisions of all state courts of last resort which had ruled upon the question. *Greves* v. *Shaw*, (1899) 173 Mass. 205, 53 N. E. 372; *In re Bronson*, (1896) 150 N. Y. 1, 44 N. E. 707; see collection of cases from state courts in annotation at 42 *A. L. R.* 365, *et seq.* There is no decision from any court, under statutory provisions comparable to those of Utah, to the contrary prior to *First National Bank of Boston* v. *Maine, supra.*

Even this Court, prior to the First National Bank decision, had on many occasions recognized the right and power of the state of incorporation to tax the transfer of stock in domestic corporations whether owned by resident or nonresident decedents. *Maxwell* v. *Bugbee*, (1919) 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; *Frick* v. *Pennsylvania*, (1925) 268 U. S. 473, 69 L. ed. 1058, 45 S. Ct. 603; *Rhode Island Hospital Trust Company* v. *Doughton*, (1926) 270 U. S. 69,70 L. ed. 475, 46 S. Ct. 256; see also *Blackstone* v. *Miller*, (1903) 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277; *Baker* v. *Baker, Eccles & Company*, (1917) 242 U. S. 394, 61 L. ed. 386, 37 S. Ct. 152; *Corry* v. *Baltimore*, (1905) 196 U. S. 466, 49 L. ed. 556, 25 S. Ct. 297.

The cases of *Farmers Loan & Trust Company* v. *Minnesota*, (1930) 280 U. S. 204, 74 L. ed. 371, 50 S. Ct. 98; *Baldwin* v. *Missouri*, (1930) 281 U. S. 586, 74 L. ed. 1056, 50 S. Ct. 436; and *Beidler* v. *South Carolina Tax Commission*, (1930) 282 U. S. 1, 75 L. ed. 131, 51 S. Ct. 54, are not opposed to the position herein contended for by your petitioner. Those cases all involved evidences of *debts* —

bonds, notes and open accounts. There is a definite, real and substantial difference between stocks, on the one hand, and bonds, or other evidences of debt, on the other. *In re Bronson, supra;* annotation at 42 *A. L. R.* 355, *et seq.*, especially at 357. This distinction was recognized and carefully applied prior to *First National Bank of Boston* v. *Maine, supra.* Compare *Larson v. MacMiller, supra,* to *McLaughlin* v. *Cluff,* (1925) 66 Utah 245, 240 Pac. 161. The decision in the First National Bank case failed to apply this long recognized distinction.

II.

First National Bank of Boston v. Maine Should Be Reconsidered by this Court

For the reasons and upon the grounds and authorities set forth in Point I hereunder, as well as other bases to be hereinafter enumerated, it is submitted that the majority decision of this Court in *First National Bank of Boston* v. *Maine, supra,* should be reconsidered. That decision failed to apply recognized and established principles of law governing taxation by states and misinterpreted the extent of the prohibition contained in the Fourteenth Amendment to the United States Constitution.

The economic or moral wisdom of a tax is properly a subject for legislative, not judicial, consideration. States should be free to tax and to devise methods and subjects of taxation without fear of judicial intervention, so long as such taxing methods and systems are not plainly in violation of the Constitution of the United States. *New York Fire Insurance Company* v. *State Board of Tax Appeals,* (1939) 307 U. S. 313, 83 L. ed. 1312, 59 S. Ct. 918; *Wisconsin* v. *J. C. Penney Company,* (1940) 311 U. S. 435, 85 L. ed. 222, 61 S. Ct. 246; *Commonwealth* v. *Stewart,* (1940) 338 Pa. 9, 12 Atl. (2d) 444, affirmed by Supreme Court of United States, 312 U. S. 649, 85 L. ed. 389, 61 S. Ct. 445. As recognized in both the majority and dissenting opinions in First National Bank of Boston v. Maine, many states,

prior to that opinion, had enacted reciprocal legislation to avoid multiple taxation of the transfer of shares of stock, as well as other intangibles. See also 53 *Harvard Law Review* 69-70. If First National Bank of Boston v. Maine is law, such legislative enactments become mere vain gestures. We submit that "legislative legislation" is the proper method to meet any objection there may be to such multiple taxation, not "judicial legislation" under the guise of interpreting the Fourteenth Amendment.

Even the majority opinion in the First National Bank case recognized a jurisdiction to tax existent in the state of incorporation. The dissent, of course, is based upon a recognition of such jurisdiction. The majority, however, recognizing also a jurisdiction to tax in the state of the domicil of the owner, felt compelled, by something read into the Fourteenth Amendment against multiple taxation, to decide between the jurisdiction of two states. Therein lies the error of which the dissent complained and to which we take exception.

After making its choice in favor of the state of domicil, the majority opinion then went on in an attempted justification of the choice by arguing that the power to impose death transfer taxes rested upon the power of the state to control the privilege of succession. This, again, was erroneous. *Knowlton* v. *Moore,* (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

Regardless of the soundness of that decision, the sole principle upon which it was based has been repudiated by later decisions of this Court. That principle, simply stated, was that the Fourteenth Amendment prohibited more than one state from subjecting the transfer of an intangible to a death duty transfer tax. As stated by Mr. Justice Sutherland in the majority opinion at 284 U. S. 328:

> "We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only."

Without that basis, the decision necessarily falls, for, absent that basis, there is no necessity for choosing between two states, each having jurisdiction. That principle has been unequivocally repudiated by this Court in *Curry* v. *McCanless*, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900, and *Graves* v. *Elliott*, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913.

In *Curry* v. *McCanless, supra,* a resident of Tennessee transferred certain intangibles in trust to an Alabama trustee. At death, both Tennessee and Alabama claimed the right to subject those intangibles to their respective death transfer tax. Each contended for the right to tax to the exclusion of the other, apparently assuming that this Court would continue to apply the rule of First National Bank of Boston. This Court, however, held that *both* states could tax, upon the ground, necessarily, that the Fourteenth Amendment contained no prohibition against two states taxing the transfer at death of the same intangibles.

In *Graves* v. *Elliott, supra,* a New York decedent had retained a power of revocation in connection with a trust of intangibles held by a Colorado trustee. This Court again held that *both* Colorado and New York could tax the transfer at death of the intangibles.

Either the rule of *First National Bank* is law or the rule of *Curry* v. *McCanless* and *Graves* v. *Elliott* is law. Both rules cannot stand, since they are irrevocably irreconcilable. The rule of the latter cases correctly returns to the principle that the Fourteenth Amendment does not prohibit multiple taxation. *Blackstone* v. *Miller,* (1903) 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277. The rule announced in the latter cases should prevail. See also *Commonwealth* v. *Stewart, supra; Pearson* v. *McGraw,* (1939) 308 U. S. 313, 84 L. ed. 293, 60 S. Ct. 211; to the same effect see *Van Dyke* v. *Wisconsin Tax Commission,* (1940) 311 U. S. 605, 85 L. ed. 46, 61 S. Ct. 5.

Under the rule of these later cases, the State of Utah, having jurisdiction and freed of the supposed shackles of

the Fourteenth Amendment, may proceed to levy its tax. That the State of Utah has jurisdiction, see cases cited under Point I; see also *Newark Fire Insurance Company* v. *State Board of Tax Appeals, supra; Wisconsin* v. *J. C. Penney Company, supra; Commonwealth* v. *Stewart, supra; Nelson* v. *Sears, Roebuck & Company,* (1941) 312 U. S. 359, 85 L. ed. 522, 61 S. Ct. 586; *Nelson* v. *Montgomery Ward & Company,* (1941) 312 U. S. 373, 85 L. ed. 529, 61 S. Ct. 593.

These later decisions are also in harmony with the concurring opinion of Justice Stone and the dissent of Justices Holmes and Brandeis in *Farmers Loan & Trust Company* v. *Minnesota, supra;* the dissent of Justice Holmes (in which Justices Brandeis and Stone concurred) in *Baldwin* v. *Missouri, supra,* and *Beidler* v. *South Carolina Tax Commission, supra;* the dissent of Justice Stone (joined by Justices Holmes and Brandeis) in *First National Bank of Boston* v. *Maine, supra.* Throughout these dissents runs the same principle that now again finds majority support in *Curry* v. *McCanless* and *Graves* v. *Elliott, supra,* —namely, that the Fourteenth Amendment contains no prohibition against multiple taxation. See also *Cooley* on Taxation, 4th Edition, Sections 223 and 224, also Section 143. A comparative reading of the dissents above noted and the controlling opinion in *Curry* v. *McCanless* demonstrates a remarkable similarity, almost identity, of thought, principle and law.

First National Bank of Boston v. *Maine* should, therefore, be reconsidered in the light of later controlling opinions of this Court.

III.

This Petition Presents a Question of General Importance which Should Be Decided by this Court

Since 1932, the states have considered themselves barred by the decision in *First National Bank of Boston* v. *Maine*

from attempting to levy a death transfer tax on stock of domestic corporations owned by nonresident decedents because of the rule of that case against multiple taxation. See 53 *Harvard Law Review* 68, 70. The more recent decisions of this Court hereinbefore cited have created doubts as to the present efficacy of the First National Bank of Boston rule. 53 *Harvard Law Review* 68, 71-72. As typical examples of the doubt now existent see *Prentice-Hall*, "Inheritance and Transfer Tax Service", Pennsylvania, paragraph 1012; Oregon, paragraph 1013; West Virginia, paragraph 1001; Arizona, paragraph 201; Utah, paragraph 1009; Vol. I, Reciprocity, paragraph 501. See also annotation at 123 *A. L. R.* 179, especially at pages 197, *et seq.*

In 53 *Harvard Law Review* at page 71 the following appears:

> "The chief importance of the 'trust situs' cases (Curry v. McCanless and Graves v. Elliott) is the possibility that they foreshadow decisions to the effect, among others, that the state in which a corporation is organized may tax the transfer at death of stock in that corporation owned by a nonresident." (Parenthetical insertion ours.)

Under the present state of the law, confusion exists as to the extent of the constitutional power of the states. Taxing authorities are necessarily faced with the problem of enforcing tax legislation as written. Legislative changes which might otherwise be contemplated are of doubtful necessity and efficacy. Orderly administration of revenue measures, protection of state revenues and sources of revenue, as well as the interests of many citizens in making decisions as to investments, all indicate the imperative importance of having the questions raised in this proceeding decided by this Honorable Court at the earliest possible moment.

CONCLUSION

Petitioner prays that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

J. LAMBERT GIBSON,
GARFIELD O. ANDERSON,
Counsel for Petitioner.

APPENDIX A.

Chapter 12, Title 80, Revised Statutes of Utah, 1933, As Amended by Chapter 88, Laws 1935

Section 80-12-2:

A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, whether a resident or nonresident of this state:

Three per cent of the amount by which the net estate exceeds $10,000 and does not exceed $25,000;

Five per cent of the amount by which the net estate exceeds $25,000 and does not exceed $75,000;

Eight per cent of the amount by which the net estate exceeds $75,000 and does not exceed $125,000;

Ten per cent of the amount by which the net estate exceeds $125,000; *provided,* at the discretion of the tax commission, the taxpayer may choose to pay in kind on an estate or any portion thereof which is not liquid.

Section 80-12-3:

The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any other state or country, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death.

Section 80-12-9:

Where any property belonging to a foreign estate is subject to the payment of the tax herein provided for, such tax shall be assessed upon the market value of such property remaining after the payment of such debts and expenses as are chargeable to the property under the laws of this state, and, in the event that the executor of such foreign estate files with the

clerk of the court in this state having ancillary jurisdiction statements in writing exhibiting the true market value of the entire estate of the decedent, and the amount of indebtedness for which the decedent has been adjudged liable at the time of his death in other jurisdictions, which statements shall be in affidavit form and sworn to by such executor, there shall also be deducted such proportion of the said indebtedness of the decedent from the value of the property within this state as the value of the property within this state bears to the value of the entire estate; *provided*, that in all such cases where the property within this state consists of personal property only, the statements hereinbefore provided for shall also be filed with the state tax commission.

Section 80-12-34:

If an executor shall assign or transfer any corporate stock or obligations standing in the name of a decedent, or in trust for a decedent, liable to tax hereunder, the tax shall be paid to the state tax commission on or before the transfer thereof; otherwise, the corporation permitting its stock or obligations to be so transferred shall be liable to pay such tax, and it is the duty of the state tax commission to enforce the payment thereof.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 814

THE STATE TAX COMMISSION OF UTAH,
Petitioner,

vs.

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased,
Respondents.

BRIEF OF PETITIONER

J. LAMBERT GIBSON,
GARFIELD O. ANDERSON,
Counsel for Petitioner.

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Colorado Bank v. Commissioner, (1938) 305 U. S. 23, 83 L. ed. 20, 59 S. Ct. 48 68

Commonwealth v. Stewart, (1940) 338 Pa. 9, 12 Atl. (2d) 444, Aff'd. by Supreme Court of U. S., 312 U. S. 649, 85 L. ed. 1101 61

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Davidson v. City of New Orleans, (1877) 96 U. S. 97, 24 L. ed. 616 18

Den ex dem. Murray v. Hoboken, etc., (1855) 59 U. S. 272, 18 How. 272, 15 L. ed. 372 18

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REFERENCES AND AUTHORITIES

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Am. Jur., Vol. 12, "Constitutional Law", Sections 476, et seq. 61
Baldwin's New York Consolidated Laws, Ann., 1938, Tax Law, Art. 12, Sec. 270 61
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Fletcher, Cyclopedia Corporations, Permanent Edition:
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I.

OPINIONS OF COURTS BELOW

This case was decided by the Supreme Court of the State of Utah on September 17, 1941 and is reported at .....Utah....., 116 Pac. (2nd) 923. The memorandum decision of the trial court is unreported, but is found at pages 15-16 of the Record.

II.

JURISDICTION

The Supreme Court of the State of Utah is the highest court of law and equity of that State.

The judgment of the Supreme Court of the State of Utah herein sought to be reviewed was entered on September 17, 1941 (R. 26). Petition for rehearing was denied by the Supreme Court of the State of Utah on October 24, 1941 (R. 26). The judgment of the Supreme Court of the State of Utah was rendered in a cause in which the validity, under the Fourteenth Amendment to the Constitution of the United States, of Sections 80-12-2 and 80-12-3, Revised Statutes of Utah, 1933, was directly involved.

Petition for writ of certiorari was granted by this Honorable Court on January 12, 1942.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 937 (28 U.S.C.A., Sec. 344) and the Act of February 13, 1925, c. 229, Sec. 8, 43 Stat. 940 (28 U.S.C.A., Sec. 350).

III.

STATEMENT OF THE CASE

The petitioner, the State Tax Commission of the State of Utah, is a body politic created under and by virtue of the constitution and laws of the State of Utah and is charged with the duty, among other things, of enforcing the provisions of Chapter 12, Title 80, Revised Statutes of Utah, 1933 and of collecting the estate taxes due thereunder (R. 1-2).

Respondents are the duly appointed, qualified and acting administrators with the will annexed of the estate of Edward S. Harkness, deceased (R. 1).

Edward S. Harkness died January 29, 1940, being at the time of his death a resident of and domiciled in the State of New York (R. 1). At the date of his death, Edward S. Harkness was the owner of 10,000 shares of the common stock and 400 shares of the preferred stock of the Union Pacific Railroad Company (R. 2-3). The certificates representing these shares of stock were in the

possession of the decedent in the State of New York at the time of his death and the same certificates are now physically located in the State of New York in the possession of respondents as executors of the estate of the decedent (R. 3). These shares of stock were recorded on the books of the Union Pacific Railroad Company in the name of Edward S. Harkness at the date of his death (R. 3). Other than the ownership of the stock in question, the transfer of which the State Tax Commission contends is subject to tax under and by virtue of the provisions of Chapter 12, Title 80, Revised Statutes of Utah, 1933, the decedent owned no property within the jurisdiction of the State of Utah.

The Union Pacific Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Utah (R. 2).

At the time of Mr. Harkness' death, the laws of the State of New York allowed as a credit against the estate tax imposed by the State of New York the amount of any constitutionally valid estate or inheritance tax paid to any other state within three years after the decedent's death (R. 4).

Certain other facts which were alleged by respondents in their original complaint were admitted to exist, but were challenged as being immaterial and irrelevant. This position was maintained throughout the original proceeding and throughout the presentation of the appeal to the Supreme Court of the State of Utah. Petitioner maintains that same position before this Honorable Court and will demonstrate later in this brief why such facts are immaterial.

The State Tax Commission of Utah claims and asserts that the transfer at death of said shares of stock of the Union Pacific Railroad Company from said decedent is subject to tax under the provisions of Chapter 12, Title 80, Revised Statutes of Utah, 1933, and has demanded payment of said tax as a condition precedent to the giving of its consent to the transfer of said shares of stock from

the decedent to such beneficiaries as may be entitled thereto under the terms of the decedent's will.

On October 4, 1940, respondents filed an action in the Third Judicial District Court of the State of Utah, in and for the County of Salt Lake, praying for a declaratory judgment to the effect that the transfer of such stock was not subject to the Utah estate tax and requesting an injunction against the State Tax Commission to restrain and prohibit the Commission from asserting any tax liability upon such transfer (R. 1-8). The allegations of respondents' complaint include averments to the effect that the imposition of such a transfer tax by the State of Utah would violate the Fourteenth Amendment to the Constitution of the United States of America (R. 5, 6, 7). This was the earliest opportunity at which a federal question could be raised.

The cause was submitted to the trial court and on January 22, 1941 the trial court rendered its memorandum decision in favor of respondents and against petitioner (R. 15-16). On March 24, 1941, declaratory judgment and decree as prayed was entered by the trial court (R. 17-19). One of the grounds of said decree of the trial court was that the imposition of the tax contended for by petitioner would violate the Fourteenth Amendment to the Constitution of the United States of America. Reference to the memorandum decision of the trial court (R. 15-16) will demonstrate that in substance the sole basis of the trial court's decision was that the proposed tax would violate the Fourteenth Amendment.

Appeal was duly taken to the Supreme Court of the State of Utah (R. 19) and on September 17, 1941 the Supreme Court of the State of Utah rendered its decision, affirming that of the trial court (R. 20-26). (Utah 116 Pac. (2nd) 922.)

The decision of the Supreme Court of the State of Utah was based solely upon the principle that the proposed imposition of the tax under the facts of the case at bar

would violate the provisions of the Fourteenth Amendment to the Constitution of the United States of America.

Petition for rehearing was duly and timely made to the Supreme Court of the State of Utah on the 14th day of October, 1941 and was denied by that Court on the 24th day of October (R. 26).

Petition for writ of certiorari was granted by this Honorable Court on January 12, 1942.

IV.

SPECIFICATION OF ERRORS

The question presented in this action is whether the State of Utah may, without violation of the Constitution of the United States of America, levy and collect its state tax upon the transfer at death of shares of stock in domestic corporations which stock was at the time of death owned by a decedent nonresident of and not domiciled in the State of Utah.

We assign the following as specification of errors in the decision on that question by the Supreme Court of the State of Utah:

1. The Supreme Court of the State of Utah erred in applying the principles established by this Court in applicable decisions to the facts in this cause.

2. The Supreme Court of the State of Utah erred in its application of the Fourteenth Amendment to the Constitution of the United States to the facts in this cause.

3. The Supreme Court of the State of Utah erred in holding that the imposition of the Utah estate tax upon the transfer of shares of stock of domestic corporations of the State of Utah owned by nonresident decedents was in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Utah erred in not holding that Chapter 12, Title 80, Revised Statutes of Utah, 1933, as herein sought to be applied was valid.

V.

ARGUMENT

In this brief petitioner will present the following points in argument:

1. The tax imposed by Chapter 12, Title 80, Revised Statutes of Utah, 1933, although denominated an "inheritance" tax, is in reality an estate or transfer tax.

2. The taxation of the transfer of the shares of stock in question by the State of Utah is intended to be imposed by the Statutes of the State of Utah, if not violative of the Federal Constitution.

3. The imposition of this tax by the State of Utah is not violative of the "due process clause" of the Fourteenth Amendment, within the true meaning of that term.

4. There is a basically sound distinction, which should be observed, between stocks of domestic corporations and bonds of domestic corporations for the purpose of levying an estate tax. When this distinction is recognized and applied, the tax here proposed must be sustained.

5. Decided cases prior to the decision of this Honorable Court in *First National Bank of Boston* v. *Maine, infra*, including opinions of this Honorable Court, were unanimous to the effect that the state of incorporation could legally levy a death duty tax upon the transfer at death of stock in domestic corporations owned by nonresident decedents.

6. A critique of *First National Bank of Boston* v. *Maine, infra.*

7. *First National Bank of Boston* v. *Maine, infra,* has been reversed in principle by later decisions of this Honorable Court and should, therefore, be reexamined and specifically overruled.

1. The Utah Tax Is An Estate Tax

The tax which your petitioner proposes to impose upon the transfer of the Union Pacific Railroad Company stock is levied by the provisions of Chapter 12, Title 80,

Revised Statutes of Utah, 1933.[1] While Title 80 is denominated and commonly referred to as the "Utah Inheritance Tax Law", the character of the tax is definitely that of an estate tax upon the transfer of the net estate of a decedent. See *State Tax Commission* v. *Backman*, (1936) 88 Utah 424, 55 Pac. (2nd) 171. The State of Utah, therefore, does not levy a tax upon the right of a beneficiary to receive the property from an estate, but rather upon the privilege of transferring the property in any one or all of the ways specified in the statute.

The gross estate of a decedent is determined, so far as material to the case at bar, by including "all property * * * within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person * * * by testamentary disposition or by law of inheritance or succession of this *or any other state or country* * * *". (Section 80-12-3, Revised Statutes of Utah, 1933.) The tax is placed upon "the transfer of the net estate of every decedent, *whether a resident or nonresident of this state*". (Section 80-12-2, Revised Statutes of Utah, 1933.) (Italics ours.)

It is thus seen, as will be more fully developed later in this brief, that the Utah tax here involved is levied upon the transfer from a decedent of any and all property of every nature and kind of which the State of Utah has jurisdiction for tax purposes. We are not concerned with jurisdiction over the beneficiary who receives the property, with jurisdiction for the purpose of probate, nor with jurisdiction for any purpose other than tax upon the transfer of property of the estate. We are concerned only with jurisdiction over the property transferred for the limited purpose of taxation.

2. This Transfer Is Taxable Under Utah Law If Not Violative Of The Fourteenth Amendment

The decision rendered by the Supreme Court of the State of Utah in the case at bar clearly demonstrates that

[1] See Appendix A.

the Utah Supreme Court interprets the statutes of that state to impose the tax if constitutional under the Fourteenth Amendment to the Constitution of the United States. At page 924 of 116 Pac. (2nd), the Utah Supreme Court states:

> "For many years taxes were collected in such cases (as the case at bar) by this and several other states." (Parenthetical insertion ours.)

Again at pages 924-925 that Court stated:

> "Our statute, commonly called the Inheritance Tax Law, was enacted in 1901. Provisions imposing death duty taxes upon the transfer of stock in Utah corporations even though owned by nonresident decedents have remained on the statute books without any substantial change since that time. From the time the statute became effective until the Supreme Court of the United States handed down its decision in First National Bank of Boston v. Maine * * * citation * * * the state construed and applied the statute as including within its tax provisions stock of Utah corporations owned by nonresidents. Such application of the statute was never questioned in the courts, all estates coming within the statute as so construed paying the tax without litigation. * * * After the decision in the case of First National Bank of Boston v. Maine, supra, holding a tax such as that here involved to be in violation of the Fourteenth Amendment to the Federal Constitution, the attorney general who under the statute had been the collector of inheritance or estate taxes ceased, and advised the State Tax Commission as his successor as collector of death duty taxes to cease collecting the taxes on stock in Utah corporations owned by non-residents, because of that decision. It is clear therefore that the only reason the State Tax Commission ceased to insist upon, and to enforce its right to collect such taxes is the decision of the United States Supreme Court in the First National Bank of Boston v. Maine, supra."

Then again at page 925, after discussing some of the more recent decisions of this Honorable Court, the Supreme Court of the State of Utah concluded:

> "It matters not what our personal opinions may be in the matter. The question being one under the Federal constitution, the opinion of the Supreme Court of the United States is controlling. It having in the case of the First National Bank of Boston v. Maine, supra, declared corporate stock under circumstances such as here involved to be subject to inheritance taxes only in the state of the decedent's domicile, we must follow that ruling until the court which announced it shall overrule it."

From this opinion alone we submit that the position of the Supreme Court of the State of Utah is clearly defined, subject only to whatever limitation may be placed upon the power of the State of Utah to tax by this Court's interpretation of the Fourteenth Amendment. Prior to the decision of this Court in *First National Bank of Boston* v. *Maine*, (1932) 284 U. S. 312, 76 L. ed. 313, 52 S. Ct. 174, the State of Utah had, without exception, levied this tax upon the transfer of shares of stock of domestic corporations owned by nonresident decedents. See also *Larson* v. *MacMiller*, (1920) 56 Utah 84, 189 Pac. 579.

3. There Is No Violation Of "Due Process"

We submit that within the true meaning of the term "due process of law" as contained in the Fourteenth Amendment to the Constitution of the United States of America there is nothing unconstitutional in the imposition of the tax in the case at bar by the State of Utah.

"Due process of law" is a term which has received the interpretative attention of this Court in innumerable cases. The term, however, has never been defined by this Court. As is stated in Taylor, *Due Process of Law* (1917) at page 274:

> "The gravest desideratum in English and American law is and has ever been a clear, comprehensive and authoritative definition of the elements which, under all circumstances and conditions, constitute due process of law * * *."

This lack of definition creates an argumentative problem which is almost insurmountable. Not having a definition or delimitation of the term, it is, of course, difficult to clearly point out why a particular situation does not violate that constitutional limitation.

We believe, however, that this Honorable Court has in recent decisions indicated an acceptance of what we submit is the true meaning of that term.

In *Wisconsin v. J. C. Penney Company*, (1940) 311 U. S. 435, 85 L. ed. 267, 61 S. Ct. 246, this Court, in discussing the meaning of the term "due process of law", said at 311 U. S. 444-445:

> "The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. * * * A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.
>
> "Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. * * * That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. * * *
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> "* * * Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this Court when

state taxes come before it. At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

In *Newark Fire Insurance Company* v. *State Board of Tax Appeals*, (1939) 307 U. S. 313, 83 L. ed. 1312, 59 S. Ct. 918, two opinions were rendered by this Court. In the opinion written by Mr. Justice Frankfurter the following was stated at page 324:

"Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the National Government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."

From these opinions, especially when read in connection with the surrounding facts of the cases, we derive this conclusion. If the tax imposed by the state bears any relation to protection, benefit or opportunities granted to or power over the subject matter of the tax, then the tax does not violate the due process of law restriction. We also draw the conclusion that if the power to tax exercised by the state does not infringe upon a power reserved exclusively to the Federal Government, then it would appear that the state tax has cleared successfully at least one hurdle in connection with the due process limitation.

For many years it appears as though this Honorable Court considered the due process of law clause as impos-

ing upon it the judicial duty of examining every tax imposed by a state to determine whether the tax was wise, whether it reached fair results in the judgment of this Court, and whether the tax was economically sound. We submit that such a view of the meaning of due process is untenable. We urge that this Court consider its duty under that clause as limited to determining whether the state proposing to tax has any foundation for the levy of the tax by reason of either control over the incident of taxation, benefits conferred in connection with the incident of taxation, protection granted to such incident, or opportunities granted or created by that state and connected with the incident of taxation. If any one or more of these elements are found to exist within the taxing state then the policy of the law, the wisdom of enacting it and the choice of subjects of taxation, within reasonable limitations as to classification, are exclusively for the legislative policy of the particular state, into which field this Court should not inject itself.

Under such a test the State of Utah clearly and unmistakably has constitutional jurisdiction to levy a tax upon the transfer of shares which it has created in corporations whose very life is owed to the laws of the State of Utah.

The State of Utah has *power* over those shares as demonstrated, in only one example, by the provisions of Section 80-12-34, Revised Statutes of Utah, 1933, wherein it is provided that if any corporate stock be transferred by the corporation without the payment of the tax, such corporation shall be liable for the tax. See also *State* v. *First National Bank of Boston*, (1931) 130 Me. 123, 154 Atl. 103 (reversed by *First National Bank of Boston* v. *Maine*, *supra*); *Cream of Wheat Company* v. *Grand Forks*, (1920) 253 U. S. 325, 64 L. ed. 931, 40 S. Ct. 558; *Corry* v. *Baltimore*, (1905) 196 U. S. 466, 49 L. ed. 556, 25 S. Ct. 297; *Schuylkill Trust Company* v. *Pennsylvania*, (1938) 302 U. S. 506, 82 L. ed. 392, 58 S. Ct. 295.

The State of Utah has granted *protection* in connection with the shares of stock the transfer of which it seeks to tax. Only under its laws can the stockholders enforce certain rights, regardless of the forum in which an action might be brought against the corporation. To Utah's law the shares owe their very existence and attributes of property. Under the laws of the State of Utah the shares continue in existence and continue to have value. The protections granted by the State of Utah to these shares are manifest and multitudinous.

The corporation in which the stockholder is a part owner and the shares which the stockholder owns receive the *benefit* of having such shares and such corporation exist and live in an orderly, civilized society.

When an investor chooses to purchase shares of stock in a particular corporation he avails himself of the protection, benefits and opportunities granted under the laws of the state which created that corporation. If he, the investor, chooses to live in a state other than the state which created the corporation and the shares which he buys, he has voluntarily chosen to avail himself of the protection, benefits and opportunities of the laws of two sovereignties. He has chosen to subject himself personally to the power of the sovereign of his domicile and has chosen to subject his investment to the power and control of the sovereign of the domicile of the corporation. For, as stated in Fletcher, *Cyclopedia Corporations*, Permanent Edition, Vol. 11, Section 5101, "it is the settled general rule that the situs of corporate stock is deemed to be in the state where the corporation has its domicile, * * *"; and the domicile of the corporation is and remains in the state of incorporation. *Cream of Wheat Company* v. *Grand Forks, supra.*

In discussing this question of power, protection, benefit, opportunity as related to shares of stock and, in fact, in considering the whole problem presented by this case, it must, of course, be remembered that shares of stock are not the same thing as the certificate representing the

shares. See Fletcher, *Cyclopedia Corporations*, Permanent Edition, Vol. 11, Section 5092; see also Section 5097, where it is stated:

> "As pointed out above, shares of stock are property, but they are intangible and incorporeal property, an 'incorporeal, intangible thing,' existing only in abstract legal contemplation. There are cases, however, in which they have been referred to as tangible property, in some respects at least; but it would seem that, in such cases, the court had reference rather to the physical representative of the shares, that is, to the certificate of stock, than to the stock itself."

Being intangible, incorporeal property, existing only in abstract legal contemplation, it is, of course, difficult to discuss "situs", "location", or "presence" of a share of stock. But from authorities discussed in this brief the conclusion seems to be inescapable that shares of stock are located and have a situs at the domicile of the corporation.

We do not urge upon this Court a rule of taxation under death duty taxes which would allow the taxation of the transfer of shares of stock by the state of incorporation to the exclusion of the state of the domicile of the owner. However, let us analyze for a moment the claims of the state of the domicile of the owner to either a right to tax or the exclusive right to tax. The state of the owner's domicile admittedly gives protection, benefit and opportunities to the person of the owner. It admittedly has power and control over the person of the owner. But what does the state of the owner's domicile give in connection with or in relation to the shares of stock exclusively and divorced from the person of the owner? We submit that such state has no basis for claiming that it gives anything in relation to the shares of stock considered as property apart from the person of the owner which would entitle it to ask a tax in return. Unless the corporation in which the shares are held happens to do business in the state of the owner's domicile, that state does not

even grant the owner of the shares the benefit of its courts as a forum in which to litigate in connection with his property. If the corporation does happen to do business in that state, the courts of the state may be open as a forum but the laws of the state of incorporation will govern the rights and privileges of the shareholder and will determine the extent of his incorporeal property rights. Furthermore, the courts of the state of the corporate domicile are always open to the shareholder. It might, therefore, be argued that if any choice must be made, the choice would lie in favor of the state of incorporation rather than in favor of the state of the domicile of the owner.

But we submit that no choice is necessary or need be made between those two states so far as the right to tax is concerned.

First, even admitting for the sake of the point that "double taxation" is here involved, there is no Federal constitutional provision against it.

In *Cream of Wheat Company* v. *Grand Forks, supra,* this Court in concluding its unanimous opinion said, referring to the argument that a certain theory would result in holding intangible property to have a "situs" in two places at once and hence subject to "double taxation":

> "To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation. *Coe* v. *Errol,* 116 U. S. 517, 524; *Kidd* v. *Alabama,* 188 U. S. 730, 732; *Fidelity & Columbia Trust Co.* v. *Louisville, supra.*"

In *Illinois Central Railroad Co.* v. *Minnesota,* (1940) 309 U. S. 157, 84 L. ed. 670, 60 S. Ct. 419, in an unanimous opinion this Court said at page 164 of 309 U. S.:

> "Appellant makes some point of double taxation. But the flaw in that argument is exposed by the familiar doctrine, aptly phrased by Mr. Justice Holmes, that the 'Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds'."

See also *Fort Smith Lumber Co.* v. *Arkansas*, (1920) 251 U. S. 532, 64 L. ed. 396; 40 S. Ct. 304; *Swiss Oil Corporation* v. *Shanks*, (1927) 273 U. S. 407, 413, 71 L. ed. 709, 47 S. Ct. 393 (and cases there cited); *Baker* v. *Druesedow*, (1923) 263 U. S. 137, 68 L. ed. 212, 44 S. Ct. 40; *Citizen's National Bank of Cincinnati* v. *Durr*, (1921) 257 U. S. 99, 109, 66 L. ed. 149, 42 S. Ct. 15; *Curry* v. *McCanless*, *infra*.

These opinions, as well as those in cases to be discussed later in this brief, are unequivocal in holding that there is no prohibition against double taxation in the Fourteenth Amendment nor anywhere else in the Constitution of the United States. That being true, respondents have no basis for objection to this tax. Respondents' sole theory to date is that *First National Bank of Boston* v. *Maine*, *supra*, is controlling. As we shall establish under point 6 of this brief, the single basic principle upon which the *Maine* case is founded is that the Fourteenth Amendment prohibits double taxation. That foundation being destroyed, the decision crumbles of its own weight. Since this argument will be fully developed under points 6 and 7, we pass further enlargement thereon at this time. The Court is respectfully reminded of the unbroken, unquestioned line of authorities cited above when considering points 6 and 7.

Second, we present that "double taxation" is a misnomer when used in connection with a case such as the one at bar. Double taxation is not involved in this case. "Multiple taxation" may be involved but certainly there is no constitutional limitation against multiple taxation. See *Illinois Central Railroad Company* v. *Minnesota*, *supra*; Cooley on *Taxation*, 4th Edition, Vol. 1, Section 223, pages 475-6[11].

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[11] In Section 223, Cooley states the rule to be as follows:

> "To constitute double taxation, objectionable or prohibited, the two or more taxes must be (1) imposed on the same property, (2) by the same state or government, (3) during the same taxing period, and (4)

Referring back, however, to the test which we submit is the proper test in determining whether a tax violates the due process clause, namely, the "power, protection, benefit or opportunity test" laid down by recent decisions of this Court, we submit that, regardless of the use of the term "double taxation" being proper or improper, the Fourteenth Amendment cannot be stretched to the point of prohibiting even true double taxation where two states, two separate sovereigns, both give, in any measure, protection, benefits or opportunities, or in any measure exercise or have the jurisdiction to exercise power in relation to the incident of taxation.

We believe that this Court need not restrict itself further in interpreting the phrase "due process of law" than it

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for the same purpose. *There is no double taxation,* strictly speaking, *where* (a) *the taxes are imposed by different states,* (b) one of the impositions is not a tax, (c) one tax is against property and the other is not a property tax, or (d) the double taxation is indirect rather than direct." (Italics ours.)

And again, in Section 230, Cooley lays down the following principles in connection with a discussion of the effect of even a specific constitutional prohibition against "double taxation":

> "Duplicate taxation, as a result of being taxed in two different states, is not within a prohibition against double taxation, for the reason that a tax in another state is not considered a tax for the purposes of the state whose tax is objected to. For instance, the personalty of a nonresident may be taxed in the state where it is located although it is also taxed in the state where the owner resides. So shares of stock in a foreign corporation may be taxed to the owner in the state where he resides, even though he or the corporation has paid taxes on the stock in the state where the corporation was created, or the corporation has paid taxes on the corporate property in the home state. *Likewise, the exaction of inheritance or succession taxes in two or more states is not invalid as double taxation.*" (Italics ours.)

has in the recent decisions above discussed. However, there is authority of a very persuasive nature to the effect that due process of law means only that a person's property be not taken except in accordance with "the law of the land"; that such phrase means the same as "the law of the land" as used in the Magna Charta. 5 *Cal. Jur.* Sec. 217; see also *Den ex dem. Murray* v. *Hoboken, etc.*, (1855) 59 U. S. 272, 18 How. 272, 15 L. ed. 372; *Davidson* v. *City of New Orleans,* (1877) 96 U. S. 97, 24 L. ed. 616.

Such a definition of the term would not limit its application only to procedural due process but, on the other hand, neither would it extend its application to permit the interposition of the economic theories or any innate sense of fairness which the judiciary might feel violated by a particular exercise of the taxing power. The problem of raising revenues to support state government is sufficiently complex without injecting into the delicate structure of taxation fear or apprehension that the judiciary may consider the tax from the standpoint of equity, economics or moral justification aside and apart from the constitutional limitations explicitly laid upon the exercise of the power to tax.

We also urge that in any interpretation of the meaning of the phrase "due process of law" this Court should remember and use as a guide the historical background of that amendment. See the *Slaughter-House Cases,* (1872) 83 U. S. 36, 16 Wall. 36, 21 L. ed. 394. While the Slaughter-House Cases involved the question of the validity of the exercise of police power by the State of Louisiana under the Fourteenth Amendment, nevertheless, the case is instructive for its treatment of the history of the Thirteenth, Fourteenth and Fifteenth Amendments. See especially pages 68 to 82 of 83 U. S.

There, in the first pronouncement by this Honorable Court on the application of the Fourteenth Amendment, it was authoritatively stated that in any interpretation

of that amendment, the reasons for its enactment must be considered. It was then pointed out that the Fourteenth Amendment was enacted to require each state to give equal rights and equal protection to all persons and their property regardless of race or sex. It was placed in the Constitution to guarantee the underlying principle for which the Civil War was fought — equality of rights, opportunities and protection. Although differing in the application of that interpretation to the facts of the particular case, the dissenting opinion also recognized those same historical interpretative guides and objected only to the private character of the legislative enactment under scrutiny on the grounds that it granted a private monopoly. Surely, considered from the historical background of that amendment, this tax by the State of Utah should not be struck down.

We do not intend that this Court should apply the Fourteenth Amendment only to situations strictly analogous to those immediate problems arising after the Civil War. We do not contend for any such limited application. But we do urge that in arriving at the meaning of due process this Court should consider the historical background as one of the determinative factors. For, as was stated by the Court in its opinion in the *Slaughter-House Cases* at page 72 of 83 U. S.:

> "But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."

That opinion also lays down the principle that those words in the Fourteenth Amendment mean the same and no more as the identical words in the Fifth Amendment when applied to the National Government. See also *Mag-*

nano Company v. *Hamilton*, (1934) 292 U. S. 40, 78 L. ed. 1109, 54 S. Ct. 599.

In Burnet v. *Brooks*, (1933) 288 U. S. 378, 77 L. ed 844, 53 S. Ct. 457, this Court, against the objection that the Federal Government was barred by the due process clause of the Fifth Amendment, held squarely that the National Government had jurisdiction to tax under its estate tax law the transfer of shares of stock in domestic corporations (corporations organized or created in the United States) owned by nonresident decedents. At page 392 of 288 U. S. this Court, in citing with approval the rulings of the Commissioner of Internal Revenue, stated:

> "Stock in a domestic corporation * * * constitute property situated in the United States, although owned by * * * a nonresident. A domestic corporation * * * is one created or organized in the United States."

Again at page 394, this Court stated:

> "We think that the Government's construction of the provision is the more reasonable one; that *the place where the stock was held was not an element in the application of § 303 (d), and that this provision was designed to insure the inclusion of the stock of a domestic corporation in all cases, whether the certificates were physically present in the United States or not.*" (Italics ours.)

It is here to be noted in passing that this Court there held, as we in this brief urge, that the physical location of the pieces of paper evidencing the shares of stock is unimportant.

Finally, at pages 399 to 401 of 288 U. S. this Court stated:

> "As jurisdiction may exist in more than one government, that is, jurisdiction based on distinct grounds — the citizenship of the owner, his domicile, the source of income, the situs of the property — efforts have been made to preclude multiple taxation through the negotiation of appropriate international conventions. These endeavors, however, have proceeded upon ex-

press or implied recognition, and not in denial, of the sovereign taxing power as exerted by governments in the exercise of jurisdiction upon any of these grounds. • • •.

"Respondents urge that constitutional restriction precluding the federal estate tax in question is found in the due process clause of the Fifth Amendment. The point, being solely one of jurisdiction to tax, involves none of the other considerations raised by confiscatory or arbitrary legislation inconsistent with the fundamental conceptions of justice which are embodied in the due process clause for the protection of life, liberty and property of all persons — citizens and friendly aliens alike. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489; *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Heiner* v. *Donnan*, 285 U. S. 312, 326. If in the instant case the Federal Government had jurisdiction to impose the tax, there is manifestly no ground for assailing it. *Knowlton* v. *Moore*, 178 U. S. 41, 109; *McCray* v. *United States*, 195 U. S. 27, 61; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 153, 154; *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24; *United States* v. *Doremus*, 249 U. S. 86, 93. Respondents' reliance is upon the decisions of this Court with respect to the limitation of the taxing power of the States under the due process clause of the Fourteenth Amendment. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312. They insist that the like clause of the Fifth Amendment imposes a corresponding restriction upon the taxing power of the Federal Government.

"The argument is specious, but it ignores an established distinction. Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the States to each other in the Federal

Union. The bond of the Constitution qualifies their jurisdiction. This is the principle which underlies the decisions cited by respondents. These decisions established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State and that jurisdiction to tax was restricted accordingly. In *Farmers Loan & Trust Co.* v. *Minnesota, supra,* the Court applied the principle to intangibles, and referring to the contrary view which had prevailed, said (p. 209): 'The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad: perhaps two-thirds of the States have endeavored to avoid the evil by resorting to reciprocal exemption laws.' It was this 'rule of immunity from taxation by more than one State,' deducible from the decisions in respect of various and distinct kinds of property, that the Court applied in *First National Bank* v. *Maine, supra,* p. 326."

It would seem only fair to conclude that if jurisdiction within the meaning of due process of law existed in the National Government under the facts of *Burnet* v. *Brooks*, then, similarly, jurisdiction exists in the State of Utah in the instant case, unimpaired by the same words, subject to the same interpretation, in the Fourteenth Amendment. As has been shown above and as will be developed more fully later in this brief, due process of law cannot legitimately be taken to prohibit double taxation or, better said, taxation of the same event or transfer by two states, both having jurisdiction. Since the only other basis for respondents' contention that the tax in the instant case violates due process is grounded upon some nebulous argument that the State of Utah has no jurisdiction, and since it has been established under this point that such jurisdiction does exist (see also point 7 of this brief) it becomes clear that this tax should be sustained by this Honorable Court. See also *Curry* v. *McCanless, infra,*

especially the italicized portion of the quotation therefrom at page 52 of this brief.

Still another guide which we believe is helpful, if not controlling, in arriving at the meaning of due process of law is laid down in Taylor, *Due Process of Law* (1917) at pages 286, *et seq.* It is there stated that there are four fundamental elements comprising due process of law: (1) notice, (2) hearing, (3) application of equal laws, and (4) jurisdiction. If these four requirements are met, then due process exists. We present that such an analysis of due process is sound. Many specific constitutional guarantees exist in State and Federal Constitutions which will amply protect other inalienable rights such as trial by jury, freedom of speech, compensation for private property taken for public purposes, etc. But if a person may not be deprived of his property without first, notice of proceedings; second, an opportunity to be heard; third, the application to him of laws equally applicable to others similarly situated; and fourth, the existence of jurisdiction in the sovereign government which is acting, surely his rights, his immunities, his privileges, his property will be fully protected — surely due process of law exists.

In this case, respondents have never made any point of lack of due process under any of the first three requirements listed by Taylor, *supra.* Respondents have had notice. There have been hearings in court in regular, established procedural manner. The tax applied to respondents is applied equally to all persons similarly situated, to all decedents owning shares of stock in domestic corporations of Utah. Respondents' only apparent ground for contesting the application for this tax under Taylor's test would be under the fourth requirement. As we have demonstrated above and as will be more conclusively established later in this brief, the jurisdiction of the State of Utah to levy the tax is clear.

We, therefore, submit that under any proper interpretation of "due process of law" the tax here proposed is constitutional. We further submit that the due process of

law clause of the Fourteenth Amendment does not require this Court to make any choice between the power of the State of New York and the power of the State of Utah to levy a tax in the instant case and that to do so would result in this Court's ascribing to that term a meaning wholly unintended and unwarranted.

4. Distinction Between Stocks and Bonds

In the discussion of this problem, we believe it to be highly important to distinguish clearly between stocks on the one hand and bonds (as well as other evidences of debt) on the other. We are here concerned only with the question of the taxability of the transfer at death of shares of stock in a Utah corporation. We are not concerned with the problem of whether bonds of a Utah corporation would be taxable under similar circumstances. There is a real, substantial distinction between the fundamental characteristics of stocks as compared to bonds — a distinction which has been universally recognized.

This distinction is well stated in the case of *In re Bronson*, (1896) 150 N. Y. 1, 44 N. E. 707, in which the court said at pages 708-9 of 44 N. E.:

> "The attitude of a holder of shares of capital stock is quite other than that of a holder of bonds towards the corporation which issued them. While the bondholders are simply creditors, whose concern with the corporation is limited to the fulfillment of its particular obligation, the shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. * * * Each share represents a distinct interest in the whole of the corporate property. * * * The attempt to tax a debt of the corporation to a nonresident of the state, as being property within the state, is one thing, and the imposition of a tax upon the transfer of any interest in or right to the corporate property itself is another thing. The corporation is the creation of state laws, and those who become its members, as shareholders, are subject to the operation

of those laws, with respect to any limitation upon their property rights, and with respect to the right to assess their property interests for purposes of taxation."

In other words, a bondholder is a creditor of the corporation. The bond represents a debtor-creditor relationship. It may well be that there is nothing in the nature of wealth in the state of incorporation so far as a bond is concerned, for the corporation owes the amount of money represented by the bond to the bondholder. So far, therefore, as the state of incorporation is concerned, it might be argued that the bond represents a minus or negative wealth and that the only situs (if a "situs" there must be when dealing with intangibles) of any plus or positive wealth is at the domicile of the creditor.

On the other hand, a share of stock is a partial ownership of the corporation. The stockholder has a right to a share of the profits, a right to a voice in the management (depending, of course, upon the type of stock held), and a right to a proportionate share of the assets of the corporation upon dissolution. The corporation does not owe the stockholder anything in the sense of owing a debt. The stockholder is simply one of the owners of the corporation.

The stock certificate is, we submit, unimportant in the consideration of this case. The certificate is nothing more than a muniment of title, the paper evidence of the bundle of rights making up a share. It is the share, not the certificate, which, for our purposes at least, is the thing of value, the property. See Fletcher, *Cyclopedia Corporations*, Permanent Edition, Vol. 11, sec. 5096, especially at page 76; *Burnet* v. *Brooks*, *supra*.

Every state court of last resort to which this tax problem was presented, and this Court prior to *First National Bank of Boston* v. *Maine*, *supra*, recognized and carefully applied this distinction and held the transfer at death of stock in domestic corporations owned by nonresident decedents taxable under death duty statutes identical

so far as here material, with the Utah law. See collection of cases at 42 *A. L. R.* 365; see also cases treated under point 5 of this argument. Most of the state courts, as well as this Honorable Court prior to the First National Bank case, held the transfer of bonds under similar circumstances not taxable, but only after a careful analysis of the distinction we here urge. *In re Bronson, supra;* compare *Larson* v. *MacMiller, supra,* to *McLaughlin* v. *Cluff,* (1925) 66 Utah 245, 240 Pac. 161. Some state court decisions allowed the taxation of the transfer of bonds as well as stocks. See 42 *A. L. R.* 355, *et seq.,* especially at 357 for a collection of cases on the taxation of the transfer of bonds.

The departure by this Honorable Court from the application of this rule of distinction in the First National Bank decision was an unwarranted refusal to recognize and apply a firmly established and well grounded principle of law. This Court should now return to a recognition of this distinction. In so doing, this Court could reverse *First National Bank of Boston* v. *Maine, supra,* without disturbing the line of cases represented by *Farmers Loan & Trust Company* v. *Minnesota,* (1930) 280 U. S. 204, 74 L. ed. 371, 50 S. Ct. 98. That line of cases might be supportable on the theory of there being no positive wealth in the state of the domicile of the debtor; therefore, there is nothing of value transferred within the tax jurisdiction of that state; therefore, for such state to attempt to tax the transfer of a bond (or other evidence of a debt) would be an attempt to exercise extraterritorial jurisdiction which would be invalid under the Federal Constitution.

But to apply that reasoning to the transfer of a share of stock is, we submit, erroneous. The share of stock does represent positive wealth in the state of incorporation. That state is the domicile of the corporation. See *Cream of Wheat Co.* v. *Grand Forks, supra,* where it was stated at page 328 of 253 U. S.:

> "The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of

> that State. As said by Mr. Chief Justice Taney, 'It must dwell in the place *of its creation, and cannot migrate to another sovereignty.*' * * * The fact that its property and business were entirely in another State did not make it any the less subject to taxation in the State of its domicile." (Italics ours.)

That state admittedly (see page 7 of respondents' brief in opposition to petition for writ of certiorari) has jurisdiction over the shares. Otherwise how could it levy a property tax upon such shares? *Corry* v. *Baltimore*, (1905) 196 U. S. 466, 49 L. ed. 556, 25 S. Ct. 297; *Schuylkill Trust Co.* v. *Pennsylvania*, (1938) 302 U. S. 506, 82 L. ed. 392, 58 S. Ct. 295.

In *Schuylkill Trust Co.* v. *Pennsylvania, supra*, this Court in upholding a tax by Pennsylvania on the shares of stock of domestic corporations regardless of the domicile of the owner, said at page 516 of 302 U. S.:

> "Moreover, the shares represent a property interest * * *. *The shareholders, whether domestic or foreign, depend for the preservation and protection of this property upon the law of the state of the corporation's domicile.* The property right so represented is of value, arises where the corporation has its home, *and is therefore within the taxing jurisdiction of that state; and this, notwithstanding the ownership of the stock may also be a taxable subject in another state.*" (Italics ours.)

Having such jurisdiction, and there being positive wealth present in the state of incorporation, the distinction must be recognized and applied. The result would be validity of the tax levy here proposed.

5. The Law Prior to First National Bank of Boston v. Maine

Before the decision of this Honorable Court in *First National Bank of Boston* v. *Maine, supra*, there was apparently no question in any court, including this Court as demonstrated by prior pronouncements, of the jurisdiction and power of the state of incorporation to tax, under death duty statutes, the transfer of shares of stock in

a domestic corporation owned by nonresident decedents at date of death. With one exception, Louisiana, the court of last resort of every state to which the problem was presented found in favor of the tax.

With regard to Louisiana, a marked difference in the statutory provisions existed which sharply differentiates the decision of that state supreme court. The Louisiana statute provided as follows:

> "* * * said tax shall be imposed with respect to all property * * * embraced in any inheritance, * * * including all personal property *physically* in the state, * * * whether owned or inherited by * * * a resident or nonresident * * *." See page 344 of 109 So.

In *Newell* v. *Tremont Lumber Company*, (1926) 161 La. 649, 109 So. 344, the Supreme Court of Louisiana held that shares of stock in Louisiana corporations owned by nonresident decedents, the certificates of stock being held at the domicile of such resident, were not subject to tax under the Louisiana statute. The court, of course, placed great stress on the use of the word "physically" in the statute. The use of the word "physically" must have been intentional upon the part of the Louisiana Legislature. The statutes of all other states which had ruled upon this problem contain no such limitation but, on the contrary, demonstrate a clear intent to tax the transfer of intangible property which is in any manner within the jurisdiction of the taxing sovereign. It would appear that perhaps Louisiana could not tax any intangibles owned by nonresident decedents, regardless of the type of tax situs the intangible might have within the State of Louisiana, under such a statute, for the obvious reason that to attempt to ascribe a physical location to an intangible is to be met at the very threshhold by a contradiction in terms. An intangible, it would seem, can have no *physical* situs anywhere, for lack of physical being is the very attribute of an intangible which distinguishes it from a tangible.

Other than this one decision from Louisiana, the bench of this country was unanimous in holding such transfers taxable under statutes similar to that of Utah.

For example, the Maine statute under which the Supreme Court of Maine held taxable the transfer of the stock in *State* v. *First National Bank of Boston, supra,* read thus:

> "All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, * * * shall be subject to an inheritance tax for the use of the state as hereinafter provided * * *." Rev. Stat. Me., c. 69, sec. 1.

The New York statute under which *In re Bronson, supra,* was decided provided for a tax upon the transfer of property:

> "When the transfer is by will or by the intestate laws of this state from a resident decedent; or when the transfer is * * * of property within this state and the decedent was a nonresident at the time of his death." See page 707 of 44 N. E.

The Massachusetts statute considered in *Greves* v. *Shaw,* (1899) 173 Mass. 205, 53 N. E. 372, provided for a tax on the transfer of:

> "* * * all property within the jurisdiction of the commonwealth and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible." See 53 N. E. 372.

The comparable provisions of the Utah statute are as follows:

Sec. 80-12-2:

> "A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, *whether a resident or nonresident of this state:* * * *." (Italics ours.)

Sec. 80-12-3:

> "The value of the gross estate of a decedent shall be determined by including the value at the time of his death of *all property, real or personal, within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any other state or country,* or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death." (Italics ours.)

If any substantial difference exists between the Utah statute and the other representative statutes quoted, it is that the Utah statute more clearly embraces within its terms such transfers as those in the case at bar. It clearly contemplates the taxation of every conceivable type of interest within the jurisdiction of the State of Utah transferred as a result of the death of the owner, regardless of what sovereign may regulate the succession to the property. These provisions have existed in the Utah law since it was first enacted.

Prior to the First National Bank decision, the State of Utah, through the office of the Attorney General of Utah, assessed its estate tax against the transfer at death of stock in Utah corporations owned by nonresident decedents. *Aldrich, et al.* v. *State Tax Commission,* (1941) ..... Utah ....., 116 Pac. (2nd) 923. Such a tax was sustained by the Utah Supreme Court in a case in which the facts were identical, even to the stock involved. *Larson* v. *MacMiller, supra.* While it is true that in Larson v. MacMiller the question of the jurisdiction of the State of Utah to levy the tax was not directly raised, nevertheless, that court sustained the tax under identical circumstances.

Similarly, the Supreme Courts of at least fifteen states, including Utah, and one territory (Hawaii), had upheld

the right of the state of incorporation to levy an inheritance or estate tax upon the transfer at death of stock of domestic corporations owned by nonresident decedents. See 42 *A. L. R.* 365, *et seq.; State* v. *First National Bank of Boston, supra;* see also Fletcher, *Cyclopedia Corporations,* Permanent Edition, Vol. 14, Section 6981, especially at page 631.

In the interest of brevity, only a few of the cases collected at 42 *A. L. R.* 364 will be discussed but the Court is respectfully referred to the cases there cited for a complete picture of the universality of the law on this problem before *First National Bank of Boston* v. *Maine.*

One of these state court decisions is particularly interesting from an historical as well as a legal standpoint. In *Greves* v. *Shaw,* (1899) 173 Mass. 205, 53 N. E. 372, the Supreme Judicial Court of Massachusetts had before it exactly the problem presented to this Court. Their statute, so far as material, was the same as Utah's and subjected to tax "all property within the jurisdiction of the commonwealth and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible". At page 372 of 53 N. E. the Massachusetts court stated:

> "There can be no doubt that stock in corporations organized under the laws of this commonwealth * * * is property within the jurisdiction of the commonwealth, within the meaning of this statute. * * * Cases cited. * * * Such a corporation, being in a sense a citizen of this state, and having an abiding place here akin to the domicile of a natural person, is subject to the jurisdiction of the commonwealth, and is in fact within the commonwealth. The stockholders are the proprietors of the corporation, which is itself the proprietor of the property owned and used for the ultimate benefit of the stockholders. While the corporation has a full and complete legal title to the corporate property, its ownership is in a sense fiduciary; for, on winding up its affairs, the surplus after the payment of debts must be divided among the stockholders. * * * That the certificates

in the present case were in the State of New York at the time of the death of the testatrix is immaterial."

Historically, the case is interesting by reason of the fact that the trial judge in the case is shown in the reported decision to have been one Oliver W. Holmes. This same Oliver W. Holmes, later better known as Oliver Wendell Holmes, and respected and revered as one of the greatest legal minds ever produced in this country, joined in the dissenting opinion in *First National Bank of Boston* v. *Maine*, decided thirty-three years after he had held, as a Bristol County Supreme Judicial Court judge in Massachusetts, that the state of domicile of the corporation could tax the transfer, under a death duty tax law, of stock in the corporation owned by nonresident decedents.

Legally, the case is interesting for the clarity of the language in which it expresses the opinion. We submit that the propositions announced are sound.

Another of the state cases sustaining the tax for which the state here contends is that of *In re Bronson*, *supra*. In the Bronson case the question of the taxability of the transfer of both stocks and bonds of domestic corporations owned by nonresident decedents was presented. The majority of the court held that the transfer of the bonds was not taxable but, after clearly distinguishing between stocks and bonds, held the stock transfers to be taxable under the New York death duty law. There was a vigorous dissent in this Bronson case, but interestingly enough, the dissent was not upon the ground that the stock transfer was not taxable by the State of New York; the dissenters agreed wholeheartedly with the majority that the stock was includable in the New York estate, but dissented from the holding that the transfer of the bonds was not taxable, contending, with what was at least logical and legal reasoning, that the bond transfers, too, should be held subject to tax.

In *Security Trust Co.* v. *Edwards*, (1917) 90 N. J. L. 558, 101 Atl. 384, the Court of Errors and Appeals of New Jersey said at 101 Atl. 386:

"Now the doctrine is too well established to need discussion that the stock of a New Jersey corporation has a situs in this state and is subject to succession taxation here. Dixon v. Russell, 79 N. J. Law, 490, 76 Atl. 982 (Court of Errors); Carr v. Edwards, 84 N. J. Law, 667, 87 Atl. 132; Hopper v. Edwards, 88 N. J. Law, 471, 96 Atl. 667.

"The matter is nowhere more fully and ably discussed than in the opinion of Mr. Justice Garrison in the Supreme Court in Neilson v. Russell, 76 N. J. Law, 27, 69 Atl. 476 (1908), reversed on another point, 76 N. J. Law, 655, 71 Atl. 286, 19 L. R. A. (N. S.) 887, 131 Am. St. Rep. 673 (1908). The following is quoted therefrom, not for the purpose of supporting this elementary proposition, but as illuminating the precise question under review in the present case (76 N. J. Law, page 35, 69 Atl. page 479):

> 'In this country, where the general doctrine of the state courts is that the situs of property governs its liability to succession taxes, the weight of authority is that stock in a corporation is subject to the imposition of succession taxes by the state that created the corporation, and that in this regard the place of residence of the deceased stockholder is immaterial.' "

This same result was reached and much the same reasoning applied in all the other state court decisions prior to *First National Bank* v. *Maine, supra.* There was no dissent among the legal minds of our country, as represented on the bench, as to the principle that the transfer of stock of domestic corporations owned by nonresident decedents was subject to death duty tax by the state of the corporate domicile.

In 1919 this Honorable Court rendered a decision in connection with two cases which came to it from the state courts of New Jersey and which presented exactly the problem presented in this case. *Maxwell* v. *Bugbee* (companion case, *Hill v. Bugbee*), (1919) 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2. The representatives of the estate made the same arguments there as will be made by respondents

here in opposition to the tax. The Court summarized that argument at 250 U. S. 535 as follows:

> "Counsel for plaintiffs in error sum up their objections to the statute, based on the Federal Constitution, as follows: * * * (3) It taxes the transfer of a nonresident's property over which the State of New Jersey has no jurisdiction * * *."

This Court then proceeded to uphold the tax levied by the State of New Jersey upon the transfer of shares of stock of New Jersey corporations owned by nonresident decedents and experienced no apparent legal difficulty in reaching its conclusion. Mr. Justice Holmes dissented from the majority, not upon the ground that the transfer of New Jersey stock was not subject to tax by New Jersey, but solely upon the ground that the method of computing the tax was erroneous. Upon the question of the jurisdiction or power of the State of New Jersey to levy the tax upon the transfer of stock in New Jersey corporations, the opinion of this Court was unanimous.

Further discussion of the state court decisions prior to *First National Bank of Boston* v. *Maine* would serve no purpose other than repetition. Suffice it to say that the proposition that the state of incorporation could tax the transfer of shares of stock of a domestic corporation under death duty taxes was uncontroverted and unanimously approved.

The state courts, however, were not alone in their position that the state of incorporation could tax under the present circumstances. This Court in several cases had specifically and with careful, exact language upheld this very right. One example has already been given in the *Maxwell* v. *Bugbee* case, *supra*.

In the case of *Frick* v. *Pennsylvania*, (1925) 268 U. S. 473, 497, 69 L. ed. 1058, 45 S. Ct. 603, this Court said:

> "The decedent owned many stocks in corporations of States, other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means

of enforcement which practically gave those States the status of lienors in possession. *As those States had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile and the actual situs of the stock of certificates.* Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore to bring them into the administration in that State it was essential that the tax be paid." (Italics ours.)

In the *Frick* case the decedent was a resident of Pennsylvania and, as evidenced by the quotation, owned stocks in corporations of other states. The Court held, as indicated, that the death duty taxes imposed by the states of incorporation were valid and went on to hold that the value of the stock in these corporations for the purpose of the Pennsylvania inheritance tax was the value of the stocks less the amount of tax paid in the other jurisdictions. It is again to be noted that this opinion was unanimous.

In *Rhode Island Hospital Trust Company* v. *Doughton*, (1926) 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256, the decedent was a resident of the State of Rhode Island. He owned stock in a New Jersey corporation. Two-thirds of the property of the New Jersey corporation consisted of real estate in the State of North Carolina. North Carolina attempted to assess its inheritance tax upon two-thirds of the value of the stock owned in the New Jersey corporation by the Rhode Island decedent. This Honorable Court denied to North Carolina the right to tax the transfer of the stock but held that both the state of the decedent's domicile and the state of incorporation could validly levy a death duty tax upon the transfer of the stock, stating at pages 80-81 of 270 U. S.:

"The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the State applies as well in the case of a transfer tax as in that of a property tax. A State

> has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred. In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, a transfer tax of course may be properly levied by the State in which he resides. So, too, it is well established that the State in which a corporation is organized may provide in creating it for the taxation in that State of all its shares, whether owned by residents or non-residents. * * * Cases cited * * *."

And again at page 83, the Court said, referring to jurisdiction for the purpose of taxing the devolution of the shares of stock:

> "That is determined by the laws of Rhode Island where the decedent owner lived or by those of New Jersey, because the shares have a situs in the State of incorporation."

See also *Blackstone* v. *Miller*, (1903) 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277 (overruled by *Farmers Loan & Trust Co.* v. *Minnesota, infra*); *Baker* v. *Baker, Eccles & Company*, (1917) 242 U. S. 394, 61 L. ed. 386, 37 S. Ct. 152; see also *Corry* v. *Baltimore, supra; Schuylkill Trust Co.* v. *Pennsylvania, supra.*

At this point, let us digress slightly to treat the question of the materiality of certain facts to which respondents will no doubt refer. These facts, in substance, are that the Union Pacific Railroad Company has its executive offices in New York; only a fractional part of its property is in Utah; only a part of its revenue comes from business transacted in Utah; only a part of its trackage is in Utah; it chose to keep its stock books and records and its transfer agent in New York. In order to simplify and expedite the proceedings and in order that there be no superfluous motions to strike or other pleadings interposed to encumber the record and prolong the litigation, petitioners admitted the existence of these facts subject to the contention and reservation that such facts were immaterial and irrelevant.

As previously stated, petitioners have maintained throughout all stages of this litigation that such facts were immaterial and irrelevant.

The decision of this Court in *Rhode Island Hospital Trust Company* v. *Doughton, supra,* conclusively demonstrates that such factual allegations are immaterial to the issues herein presented. Furthermore, petitioners are not attempting to tax the property owned by the corporation; nor to tax the income earned by the corporation; nor to measure the extent of the corporate activities; nor to tax a transfer of registration of stock certificates upon the books of the corporation. Petitioners here contend for the right of the State of Utah to tax the transfer at death of *shares* (not certificate registration, not corporate property) in a corporation of that State; shares whose life and existence are the result of Utah law; shares which are the creatures, the very children of Utah.

Respondents will undoubtedly cite the Court to the cases of *Farmers Loan and Trust Company* v. *Minnesota,* (1930) 280 U. S. 204, 74 L. ed. 371, 50 S. Ct. 98; *Baldwin* v. *Missouri,* (1930) 281 U. S. 586, 74 L. ed. 1056, 50 S. Ct. 436; *Beidler* v. *South Carolina Tax Commission,* (1930) 282 U. S. 1, 75 L. ed. 131, 51 S. Ct. 54. These cases will be discussed more fully in our treatment of the First National Bank of Boston v. Maine case under point 6. At this time we deem it sufficient to say that it is our position that none of these cases in any way invalidates the tax which the State here proposes to assess. The *Farmers Loan and Trust Company* case, *supra,* involved the taxability of bonds of a Minnesota corporation owned by a nonresident. The *Baldwin* case, *supra,* treated the taxation by Missouri of bonds and promissory notes, the paper evidences of which were in Missouri, and bank deposits in Missouri banks owned by a resident of Illinois. The *Beidler* case, *supra,* dealt with the taxation by the State of South Carolina of a debt owing to a resident of Illinois by a South Carolina corporation. It is thus noted that in all three of these cases the question was the

same, namely, the jurisdiction of a state to tax the transfer of a *debt* of a domiciliary of either that state or a state other than the creditor's domicile, owing to a nonresident, and in all three cases this Court held that the state of the debtor's domicile could not tax. We have heretofore pointed out the difference between debts as represented by bonds, promissory notes, bank deposits, open accounts, on the one hand, and shares of stock on the other. With this distinction we do not now quarrel, but urge this Court to again accept it. It was recognized throughout the history of this problem by the same courts which held the transfer of stock of domestic corporations subject to tax, including this Court.

It is worthy of note that vigorous dissents are made to all of these latter three cases by Justices Holmes, Brandeis and Stone, which will be analyzed later in this brief.

It is further interesting to note that in the *Beidler* case, *supra*, the representatives of the Illinois decedent's estate paid without contest the tax upon the transfer of shares of stock owned by the Illinois resident in the South Carolina company; and this Honorable Court again, we submit, as late as 1930, recognized the right of the state of incorporation to levy such a transfer tax. In the course of its opinion at page 9 of 282 U. S. this Court stated:

> "The interest of the decedent as a stockholder was a distinct interest, and the estate of the decedent has been taxed by South Carolina upon the transfer of his stock according to its agreed value. With respect to the items of indebtedness of the corporation to the decedent, the latter appears upon the record simply as a creditor, with his domicile in Illinois."

Our research on this subject has failed to disclose a single case in any jurisdiction, prior to First National Bank of Boston v. Maine, holding that the state of the corporation's domicile could not levy an estate or inheritance tax under factual and statutory circumstances comparable to the case at bar.

We submit that the reasoning, logic and fundamental soundness of those decisions prior to First National Bank are unanswerable and that this Court should now return to those fundamental principles.

6. The Case of First National Bank of Boston v. Maine

Some of the background of *First National Bank of Boston* v. *Maine* has been discussed above. With every attempt to avoid repetition, let us scrutinize this decision, which, we submit, is no longer law.

In 1903, in *Blackstone* v. *Miller, supra,* it was held by this Court that the State of New York could subject to its death duty tax the transfer of a deposit in a New York trust company to the credit of a decedent who died domiciled in Illinois. This decision stood unchallenged until the case of *Farmers Loan and Trust Company* v. *Minnesota, supra.* In the Farmers Loan and Trust Company case the question was whether the State of Minnesota could levy an inheritance tax upon the transfer of negotiable bonds issued by the State of Minnesota and the cities of Minneapolis and St. Paul to nonresidents of Minnesota. In that case the Court re-examined *Blackstone* v. *Miller, supra,* stated that Blackstone v. Miller could no longer be considered law and specifically overruled it. The basis, however, upon which the Farmers Loan and Trust Company decision was built was that the Fourteenth Amendment to the Constitution of the United States prohibited taxation of the same subject or transfer of property by two states. See page 209 of 280 U. S. Then Justice Stone, now Chief Justice, concurred in the result of the majority in the Farmers Loan and Trust Company case but dissented from the basis of the decision of the majority, namely, the proposition that the Fourteenth Amendment prohibited double taxation, stating at page 215 of 280 U. S.:

> "Hitherto the fact that taxation is 'double' has not been deemed to affect its constitutionality and there are, I think, too many situations in which a

single economic interest may have such legal relationships with different taxing jurisdictions as to justify its taxation in both, to admit of our laying down any constitutional principle broadly prohibiting taxation merely because it is double, at least until that characterization is more precisely defined."

Mr. Justice Stone then went on to attack any such broad pronouncement against prohibiting taxation of the same property or transfer by two states, and reaffirmed *Blackstone* v. *Miller, supra,* so far as that case related to the transfer of a bank account in the state where the bank was located.

Mr. Justice Holmes dissented from the majority opinion and was joined by Mr. Justice Brandeis in expressing the thought that since the laws of the State of Minnesota created the obligation and continued its existence, that state should be allowed to tax its transfer. Justice Holmes also condemned the majority opinion for reading into the Fourteenth Amendment any prohibition against double or multiple taxation and stated at page 218:

"A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case. The Amendment does not condemn everything that we may think undesirable on economic or social grounds."

Following the decision in the Farmers Loan and Trust Company case, this Court handed down the cases of *Baldwin* v. *Missouri, supra,* and *Beidler* v. *South Carolina Tax Commission, supra.*

The Baldwin case, *supra,* has been referred to above, and at this point we state only that again the basis of the majority opinion was that the Fourteenth Amendment prohibited taxation by two jurisdictions of the same transfer of property. Again Mr. Justice Holmes dissented and was joined in his dissent by Justices Brandeis and Stone. Justice Holmes stated at page 595 of 281 U. S.:

"Although this decision hardly can be called a surprise after *Farmers Loan and Trust Company* v. *Minnesota* * * * and although I stated my views in

those cases, still, as the term is not over, I think it legitimate to add one or two reflections to what I have said before. I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words, 'due process of law,' if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass. * * *"

With regard to the taxation by two states of the same transfer of property, Justice Holmes asks the question — What are the grounds upon which the Court struck down the right of Missouri to assess the tax? He answers this question at page 596 in these words:

"Simply, so far as I can see, that it is disagreeable to a bond owner to be taxed in two places. Very probably it might be good policy to restrict taxation to a single place, and perhaps the technical conception of domicil may be the best determinant. But it seems to me that if that result is to be reached it should be reached through understanding among the States, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of 'due process of law,' when logic, tradition and authority have united to declare the right of the state to lay the now prohibited tax."

The same situation is presented by the *Beidler* decision, and again the majority of the court places its decision upon the basis that the Fourteenth Amendment prohibits double or multiple taxation.

With this background, this Honorable Court considered the case of *First National Bank of Boston* v. *Maine, supra.*

The facts in the First National Bank case were, so far as material, identical with those in the case at bar. The decedent was a resident of the State of Massachusetts. He owned, at the date of death, shares of stock in the Great Northern Paper Company, a Maine corporation. Massachusetts subjected the transfer of the shares of this stock to its inheritance tax which was paid by the estate. The State of Maine, however, refused to allow the transfer of the shares of stock until tax was paid upon the transfer under the Maine inheritance law which was substantially the same as that of Utah. The representative of the estate paid the tax assessed by the State of Maine and sued to recover. The Supreme Court of Maine upheld the tax and the representative of the estate appealed to the Supreme Court of the United States. The majority opinion of this Court reviewed the cases of *Blackstone* v. *Miller, supra, Farmers Loan and Trust Company* v. *Minnesota, supra, Frick* v. *Pennsylvania, supra,* and other cases. After this review the majority reached the conclusion that the Fourteenth Amendment prohibited the taxing by two jurisdictions of the same transfer of intangibles.

Referring to the Farmers Loan and Trust Company case the majority opinion states at page 324-5 of 284 U. S.:

> "The view that two states have power to tax the same transfer on different and inconsistent principles was distinctly rejected; and the general reasons which support the rule that tangibles and their testamentary transfer may be taxed only by the state where they are found were held to be sufficient to inhibit the taxation by two states of intangibles with a taxable *situs* imposed by due application of the *mobilia* maxim."

Again at page 327 the majority said:

> "* * * and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states."

The opinion then, at pages 327 and 328, recognized the established principle that there are differences between bonds and stocks and that such differences might justify placing bonds in a different category from stocks for some purposes. However, the comment was then made that for the purpose of taxation such a difference, in the opinion of the majority of the Court, was inconsequential. Therein lies the first error of that opinion. (See, also, argument under point 4 of this brief.) The opinion then concludes at page 328:

> "We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only."

It is submitted, therefore, that the basis upon which the First National Bank decision must stand or fall is that the Fourteenth Amendment prohibits the taxation of the transfer of the same intangibles by two states; that it prohibits what has been called "double taxation". And therein lies what we submit is the second and really fundamental error in that opinion.

Having concluded that only one state could tax the transfer, the majority then proceeded to give reasons in support of allowing only the state of the domicile of the owner to tax, reaching the final result that the State of Maine was constitutionally prohibited by the Fourteenth Amendment from assessing the tax in question because Massachusetts could and did assess a tax upon the same transfer.

Because of the importance of this point, we repeat that a careful study of the majority opinion in the First National Bank case, as well as the cases upon which it relies,

demonstrates that the fundamental basis of the decision is that the Fourteenth Amendment prohibits taxation of the same event by more than one state. We state that this is important because, as has been and as will be demonstrated, this underlying principle of the First National Bank decision has been specifically denounced by this Honorable Court upon many occasions and overruled by more recent decisions.

Before leaving the First National Bank case, however, let us consider the dissenting opinion by Mr. Justice Stone in which he is joined by Justices Holmes and Brandeis.

Justice Stone vigorously dissents upon the ground that nothing in the Fourteenth Amendment and nothing in any prior decision of the Supreme Court of the United States, which was necessary to the decision, requires the holding that the Fourteenth Amendment prohibits taxation of the same event by two states. At page 332 Justice Stone states:

> "Such want of logic as there may be in taxing the transfer of stock of a nonresident at the home of the corporation results from ascribing a *situs* to the shareholder's intangible interest which, because of their very want of physical characteristics, can have no *situs*, and again in saying that the rights, powers, and privileges incident to stock ownership and transfer which are actually enjoyed in two taxing jurisdictions, have *situs* in one and not in the other. *Situs* of an intangible, for taxing purposes, as the decisions of this Court, including the present one, abundantly demonstrate, is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired.
>
> "The decedent, if we disregard the fiction and its attendant maxims, acquired rights and privileges with respect to a corporation created by Maine and under its control. The nature and extent of his interest are defined by the laws of Maine, and his power to secure the complete transfer of it is dependent upon them. These characteristics of corporate shares, distinguishing them in several respects from unsecured obligations to pay money, have long been explicitly recog-

nized by this Court as the source of state power to tax nonresident stockholders and as sufficient ground for its exercise. See *Frick* v. *Pennsylvania*, 268 U. S. 473, 497; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401; *Hawley* v. *Malden*, 232 U. S. 1, 12; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69, 81. See also *Corry* v. *Baltimore*, 196 U. S. 466. Compare *Citizens National Bank* v. *Durr*, 257 U. S. 99; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325."

Again at page 333 Justice Stone uses the following language:

"The present tax is not double in the sense that it is added to that imposed by Massachusetts, since the Maine statute directs that the latter be deducted from the former. But, as the stockholder could secure complete protection and effect a complete transfer of his interest only by invoking the laws of both states, I am aware of no principle of constitutional interpretation which would enable us to say that taxation by both states, reaching the same economic interest with respect to which he has sought and secured the benefits of the laws of both, is so arbitrary or oppressive as to merit condemnation as a denial of due process of law. Only by recourse to a form of words — saying that there is no taxable subject within the state, by reason of the fictitious attribution to the intangible interest of the stockholder of a location elsewhere, — is it possible to stigmatize the tax as arbitrary."

The dissent also points out at page 334 what we submit is an underlying failure by the majority opinion to recognize proper limits to judicial power:

"Even if it be assumed that some protection from multiple taxation, which the Constitution has failed to provide, is desirable, and that this Court is free to supply it, that result would seem more likely to be attained, without injustice to the states, by familiar types of reciprocal state legislation, than by stretching the due process clause to cover this case."

This latter point, manifest in the language of Mr. Justice Stone, brings up what we conceive to be another

powerful argument in favor of allowing the assessment of a tax in the present case. (See also the dissent of Mr. Justice Holmes in *Baldwin* v. *Missouri, supra.*)

At the time the First National Bank of Boston case was decided many of the states of the Union had passed reciprocal legislation which, in effect, provided that intangibles would not be taxed by a state other than the owner's domicile if like privileges were granted by the laws of such domiciliary state. See pages 327-328 of 284 U. S.; see also 53 *Harvard Law Review* 69-70.

At the present time there are at least thirty states which have either reciprocal provisions in their statutes or absolute prohibition against taxing intangibles of non-residents. If this problem is a proper or fit subject for legislation then it is submitted that the levy of the tax under the present circumstances is not unconstitutional. Otherwise, if the levy of the tax is unconstitutional, such legislation is merely a vain gesture and completely superfluous. We submit that "legislative legislation" is the proper method to be used in meeting any objection there may be to such multiple taxation, not "judicial legislation" under the guise of interpreting the Fourteenth Amendment.

See, also, authorities and argument under point 3 hereof.

In concluding our treatment of the First National Bank case as such, we submit that the decision was an unwarranted departure from firmly established principles of law; that the result was not necessarily or properly reached because of prior decisions; and that the reasoning of majority is legally unsound.

7. First National Bank of Boston v. Maine Is No Longer Law

Regardless, however, of the question of the soundness of the First National Bank decision, we submit that the principles upon which the decision rests have been denounced and reversed by later decisions of this Honorable Court and that, therefore, the decision itself has been overruled. Foremost among the decisions from which

we draw the above conclusion are the cases of *Curry* v. *McCanless*, 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900, and *Graves* v. *Elliott*, 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913 (both decided May 29, 1939).

Since these cases are substantially the same we will limit our discussion to *Curry* v. *McCanless*. In that case the decedent was a resident of Tennessee at the date of death. During her lifetime she had created an otherwise taxable trust, naming an Alabama corporation as trustee. She transferred certain stocks and bonds to the trustee to hold the intangibles in trust in Alabama. Upon her death the question arose between Tennessee and Alabama as to which state had the power to levy a death tax upon the transfer of the trust property. By what appears to have been a "friendly suit" the situation was presented to the Tennessee courts and the Supreme Court of Tennessee held that the trust property was taxable in Tennessee and not taxable in Alabama. Throughout the proceedings, in both the state courts and this Court, apparently interpreting the First National Bank case as we have in this brief, the Tennessee Supreme Court and the two states conceded that only one of them could tax the transfer. See 307 U. S. 362. When the case reached the Supreme Court of the United States, however, the decision of this Court was that *both* Tennessee and Alabama could tax the transfer of the same intangibles.

This Court specifically repudiated the principle that the Fourteenth Amendment prohibits more than one from taxing the same transfer of intangibles and stated at pages 372-373:

> "We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying the tax. On the contrary this Court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. * * * We have recently

> declined to press to a logical extreme the doctrine that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single state by attributing to them a situs within that state. We think it cannot be pressed so far here."

At pages 373-374 Justice Stone speaks out again in unmistakable criticism of previous decisions which, based on the Fourteenth Amendment, proscribed by artificialities the power of the states to tax intangibles or the transfer thereof by ascribing fictional limitations to the due process clause:

> "If we enjoyed the freedom of the framers it is possible that we might, in the light of experience, devise a more equitable system of taxation than that which they gave us. But we are convinced that that end cannot be attained by the device of ascribing to intangibles in every case a locus for taxation in a single state despite the multiple legal interests to which they may give rise and despite the control over them or their transmission by any other state and its legitimate interests in taxing the one or the other. While fictions are sometimes invented in order to realize the judicial conception of justice, we cannot define the constitutional guaranty in terms of a fiction so unrelated to reality without creating as many tax injustices as we would avoid and without exercising a power to remake constitutional provisions which the Constitution has not given to the courts."

Notice the similarity of language and the familiarity of the theme and theory of this opinion, which is now the majority opinion of this Court, when compared with the dissents of Justice Holmes and Justice Stone in the *Farmers Loan and Trust Company* v. *Minnesota*, *Baldwin* v. *Missouri*, *Beidler* v. *South Carolina*, and *First National Bank of Boston* cases, *supra*. The underlying principles of those dissents were that the Fourteenth Amendment did not prohibit taxation of the transfer of the same intangibles by more than one state and, however desirable the result might be in the minds of the Court, the Court

had no power to remake the constitution. Those same theories are the very heart of *Curry* v. *McCanless*.

At the time the dissents were written in those previous cases, by reason of numerical majority, the dissents were merely "voices crying out in the wilderness". Those voices, however, have now become the majority expression of this Court through one of the spokesmen, still a member of the Court, who joined in those previous dissents. *Mr. Justice Stone wrote the majority opinion in the Curry v. McCanless case.*

Referring further to the *Curry* v. *McCanless* decision, we find other expressions from which we conclude that First National Bank of Boston is no longer law and which herald a new approach to constitutional questions. At 307 U. S. 365-366, the Court states:

> "Such rights (referring to intangibles) are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. * * * Obviously, as sources of actual or potential wealth — which is an appropriate measure of any tax imposed on ownership or its exercise — they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities.
>
> "* * * this does not mean that the sovereign power of the state does not extend over intangibles of a domiciled resident because they have no physical location within its territory, or that its power to tax is lost because we may choose to say they are located elsewhere. A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent." (Parenthetical insertion ours.)

By the above language, the Court sustained the power of the state of the decedent's domicile to tax the intangible's

transfer even though the physical evidence of the intangible was located elsewhere.

The Court then goes on to sustain the tax on the transfer of the same intangible by another state in this language at page 367:

> "* * * when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, *the reason for a single place of taxation no longer obtains,* and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax." (Italics ours.)

In the case at bar, the owner of stock of the Union Pacific Railroad Company has availed himself of the protection and benefit of Utah's laws. His investment in a corporation created and existing by virtue of Utah laws receives the protection of those laws; the very existence of his investment, the life blood of his corporation, springs from Utah. He chose, by his act of investing, to avail himself in his choice of property of the protection, benefit and opportunities under Utah law insofar as his intangible property was concerned.

Where two states give protection to the same intangible property, one to the person of the owner and the other to the property by creating and continuing the life of the intangible itself, both states may tax:

> "Whether we regard the right of a state to tax as founded on power over the object taxed, * * * or on the benefit and protection conferred by the taxing sovereignty, or both, it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and *consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles. Shares of corporate stock may*

be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; and income may be taxed both by the state where it is earned and by the state of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state. * * * taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles." (Italics ours.) Pages 367 and 368 of 307 U. S.

The Court then goes on to strike at the unwarranted curtailment of state power to tax by previous decisions which injected into the Fourteenth Amendment the economic or moral philosophy of the Court by stating at pages 368 and 369:

"The practical obstacles and unwarranted curtailments of state power which may be involved in attemptng to prevent the taxation of diverse legal interests in intangibles in more than a single place, through first ascribing to them a fictitious situs and then invoking the prohibition of the Fourteenth Amendment against their taxation elsewhere, are exemplified by the circumstances of the present case. Here, for reasons of her own, the testatrix, although domiciled in Tennessee and enjoying the benefits of its laws, found it advantageous to create a trust of intangibles in Alabama by vesting legal title to the intangibles and limited powers of control over them in an Alabama trustee. But she also provided that by resort to her power to dispose of property by will, conferred upon her by the law of the domicile, the trust could be terminated and the property pass under the will. *She thus created two sets of legal relationships resulting in distinct intangible rights, the one embodied in the legal ownership by the Alabama trustee of the intangibles, the other embodied in the equitable right of the decedent to control the action of the trustee with respect to the trust property and to compel it to pay over to her the income during her life, and in her power to dispose of the property at death.*" (Italics ours.)

Here, as there, the decedent had availed himself of the protection and benefit of the laws of two states. New York protected and benefited the person of decedent in his chosen domicile. Utah protects the chosen property of decedent. Utah created the intangible rights which decedent owned in the form of shares of stock. Utah gives protection and benefit to those shares and to the corporation in which decedent chose to invest.

And finally there are pointed out the difficulties which arise when an interpretation of the Fourteenth Amendment superimposes thereon the judicial power of decision between states, both having a connection with the incident of tax, as to which should be entitled to levy the tax, indicating again that the courts should not inject their own ideas of wise or economically sound tax policies into the delicate, complicated tax structure through any medium such as the Fourteenth Amendment (pages 369-370):

> "Even if we could rightly regard these various and distinct legal interests, springing from distinct relationships, as a composite unitary interest and ascribe to it a single location in space, it is difficult to see how it could be said to be more in one state than in the other and upon what articulate principle the Fourteenth Amendment could be thought to have withdrawn from either state the taxing jurisdiction which it undoubtedly possessed before the adoption of the Amendment by conferring on one state, at the expense of the other, exclusive jurisdiction to tax. See *Padell* v. *City of New York*, 211 U. S. 446, 448. *If the 'due process' of the Fifth Amendment does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner, who is entitled to its protection, Burnet* v. *Brooks*, 288 U. S. 378; cf. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489, *the Fourteenth can hardly be thought to make us do so here, for the due process clause of each amendment is directed at the protection of the individual and he is entitled to its immunity as much against the state as against the national government.*

"If taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws * * * legal ownership of the intangibles in Alabama by the Alabama trustee would seem to afford adequate basis for imposing on it a tax measured by their value. * * * And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another *merely because the transfer was effected by decedent's testamentary act in another state.*" (Italics ours.)

Note also the care, expressed in the last words quoted above, with which this Court now distinguishes between jurisdiction to tax the transfer of intangibles and the power to regulate the succession thereto. See also *Knowlton* v. *Moore, infra,* and discussion thereunder.

We have quoted at some length from the decision in *Curry* v. *McCanless* for the reason that the case is undoubtedly one of the more important and far reaching recent decisions of the Supreme Court of the United States. As we have stated, the dissents of Justices Holmes, Brandeis, Stone, and others, written in connection with decisions which struck down taxing policies established by the states upon the ground that they violated the Fourteenth Amendment, continuously hammered at the proposition that the majority of the Court in those former opinions was not applying the due process of law clause of the Fourteenth Amendment but was applying rather a superstructure composed of the majority's own philosophy as to tax policies built upon some ethereal and unanswerable interpretation of the phrase "due process". "Ethereal" because no decision ever stated just what due process meant but proceeded to declare invalid any tax levied by a state which smacked of moral or economic unfairness. "Unanswerable" because by not giving a definition or an interpretation of due process, no logical argument could be made against the application of such inarticulate inter-

pretation. It would seem, from a study of earlier decisions of this Court, that the test of due process became a test of whether the Court itself felt that the tax proposed by the state was a wise or just tax. Due process became the peg upon which to hang any decision which could not otherwise be brought within the Constitution and which the majority of the members of the Court felt reached a fair result.

In *Curry* v. *McCanless* we see the thoughts, which had previously "died a-borning" as dissents, now in full flower as the majority opinion of the Court. No longer will or should any court declare unconstitutional any state tax merely because of some idea that the tax may not be fair or that the burden may be over onerous. The policy of the tax, the extent of the burden, upon whom it should fall within reasonable classification, and the advisability of exercising an existent power to tax are all problems to be decided in the forum of the legislature of the particular sovereignty. Into that forum the judiciary should inject itself only when the legislative action has clearly and palpably violated the specific terms and exact language of the constitutional provisions, not when the judiciary feels that the legislature may have been unwise.

On this same line of thought Taylor, *Due Process of Law*, (1917) states with regard to the Fourteenth Amendment as follows on page 260:

> "It was also considered necessary so to limit the scope of the amendment as to prevent the Federal courts from being submerged under a mass of new litigation involving a review of nearly every transaction between the state and its citizens. Its framers had no idea of converting the Supreme Court of the United States into a general court of appeal with jurisdiction so wide and plenary as to enable it to review all cases involving the taking away of life, liberty and property when only questions of equitable consideration or broad ideas of justice are involved. That court remains as before a court not of general but special appeal with power to supervise under the

amendment in question only when the official action of the state has violated either its provisions or those of some act of Congress passed in pursuance of it."

And again at page 261 that author states:

> "The Federal courts have nothing whatever to do with the policy or expediency of state laws, nor is the hardship or injustice of such laws necessarily an objection against their constitutional validity. 'The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the co-ordinate departments of the government.' *Angle* v. *Chicago, St. Paul, etc., Railway*, 151 U. S. 1."

See also *Dane* v. *Jackson*, (1921) 256 U. S. 589, 65 L. ed. 1107, 41 S. Ct. 556.

The ultimate test prescribed by this Honorable Court in *Curry* v. *McCanless* to determine if a tax imposed by a state is valid is whether the state has power over the incident of the tax or whether it gives protection, benefit or advantages in connection with the incident of the tax.

Upon any or all of the requirements of this test the State of Utah is entitled to levy the tax of which respondents here complain. Utah has power over the shares of the stock and the transfer thereof by the corporation. Utah has power over the corporation itself. Both the shares and the corporation are creatures of Utah law. Protection, benefit and advantages are given to the corporation and the shares by Utah. Her laws give the shares value, life, transferability. Her laws create and maintain a civilized society in which the corporation is domiciled and in which the shares reside. Her courts are open for protection of the rights of shareholders. Her laws will govern those rights in certain types of suits, regardless of the forum in which the suit is brought.

We therefore submit that analysis of the *Curry* v. *McCanless* decision demonstrates conclusively that it has overruled *First National Bank of Boston* v. *Maine*. It is not logically conceivable for this Honorable Court to have reached the result of *Curry* v. *McCanless*, namely, allowing more than one state constitutionally to tax the transfer of the same intangibles, without necessarily overruling the basic principle of *First National Bank of Boston* v. *Maine*. The First National Bank case, as we have stated, stands for only one underlying principle, namely, that the Fourteenth Amendment permits the taxation of the transfer of intangibles by only one state. Therefore, if this Court was correct in holding that Tennessee, the state of the domicile of the owner of the stock, could tax, then necessarily, in order to apply the principles of the First National Bank case, it should have held that the stock did not have a taxable situs elsewhere. If the Court found that the stock had acquired a business situs or other situs for the purpose of taxation in Alabama, a state other than the owner's domicile, then, by the application of the principles of First National Bank v. Maine, Tennessee had lost its jurisdiction. But the Curry v. McCanless decision sweeps aside the limitations and inhibitions read into the Fourteenth Amendment by the Court in First National Bank of Boston v. Maine and squarely holds, without qualification, that *the Fourteenth Amendment does not prohibit taxation of the transfer of intangibles by more than one state.*

Even the decision of the majority in the First National Bank case recognized, by reason of the apparent difficulty encountered in holding against the tax in that case, that the State of Maine had some sort of jurisdiction. The language of the Court in the Curry v. McCanless case leaves no doubt that the state of incorporation has jurisdiction to levy a death transfer tax upon the stock of the corporations which it has created and continues to give life.

We submit that since the decisions in *Curry* v. *McCanless* and *Graves* v. *Elliott*, *supra*, the status of the law is exactly where it was prior to the decision of the *First National*

Bank of Boston v. *Maine* case. That law, without question, was unanimously to the effect that the state of the domicile of the corporation had jurisdiction to tax under the circumstances of the present case and that the exercise of that jurisdiction to tax was constitutional.

There have been other recent expressions of this Court bearing upon this same problem, only a few of which will be treated here. One such case which we deem of paramount importance is *Newark Fire Insurance Co.* v. *State Board of Tax Appeals,* (1939) 307 U. S. 313, 83 L. ed. 1312, 59 S. Ct. 918. In this case the State of New Jersey had assessed a personal property tax against the appellant, Newark Fire Insurance Company, a New Jersey corporation, and had included within the measure of the tax intangible property which admittedly had acquired a business situs in the State of New York. In fact, the New Jersey Supreme Court held that the state of domicile of the corporation could impose the personal property tax upon intangibles which admittedly had acquired a business situs in another state. See 307 U. S. at page 317. Two opinions were rendered in this decision, in each of which four justices concurred and, therefore, the New Jersey court's decision was affirmed. The opinion of Mr. Justice Frankfurter, in which he was joined by Justices Stone, Black and Douglas, reads in part as follows at pages 323-324:

> "Wise tax policy is one thing; constitutional prohibition quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statesmen. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government which shoud not be constrained by rigid and artificial legal

concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the National Government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."

Note again the underlying principle of this decision—that the judiciary is not to strike down state legislation merely because the Court considers it unwise from an economic or moral standpoint, but is to be limited in its decision solely by the unembellished terms of the Constitution. The states are to be free to evolve tax policies without apprehension of judicial interference, so long as those tax policies do not clearly and unmistakably violate some exact constitutional provision or encroach upon a field reserved to the Federal Government.

Another far reaching recent decision of this Court is that found in *Wisconsin* v. *J. C. Penney Company,* (1940) 311 U. S. 435, 85 L. ed. 267, 61 S. Ct. 246. There this Court passed upon the constitutionality of a Wisconsin statute by the terms of which every corporation doing business in the State of Wisconsin was assessed, in addition to the regular corporation franchise tax, an additional 3% tax upon the privilege of declaring dividends. This tax was measured by the amount of business done in the State of Wisconsin as compared to the total business of the corporation, and that proportion of all dividends declared was subjected to the Wisconsin tax. The corporation contested the tax upon the grounds of its being an unconstitutional exercise of jurisdiction by Wisconsin for several reasons, among them being that all the activities of the corporation with reference to declaration of dividends were carried on outside the State of Wisconsin, that the books and records of the company were kept outside the State of Wisconsin, that the dividends were payable to persons other than Wisconsin

residents, etc. The Court, however, upheld the constitutionality of the tax, and in the course of the opinion used the following language at pages 444-445 of 311 U. S.:

> "The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.
>
> "Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. * * *

"* * * Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this Court when state taxes come before it. At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

If any doubt remained after the *Curry* v. *McCanless* case, *supra*, as to the constitutionality of a tax such as the one proposed in the present case, such doubt certainly was removed by the *Newark Fire* and *J. C. Penney Company* decisions. No one can interpret the language used in the course of the latter opinions otherwise than to give constitutional jurisdiction to the State of Utah in a case such as the present.

These latter decisions lay down the unequivocal rule that the only test to be applied in determining the constitutionality of a state tax statute is whether the taxing power exerted by the state "bears fiscal relation to protection, opportunities and benefits given by the state." No one can deny that the State of Utah has given protection, benefits and opportunities in connection with the levy of the tax in the case at bar. The State of Utah created the corporation and the shares. Its laws continue to give them life. Its laws protect their existence and give the stockholders of the corporation the benefit of having the corporation and shares exist and live in, and their investment protected by, the laws of "an orderly, civilized society".

See also *Commonwealth* v. *Stewart*, (1940) 338 Pa. 9, 12 Atl. (2d) 444; affirmed by United States Supreme Court at 312 U. S. 649, 85 L. ed. 1101.

It is therefore submitted that the basis on which the *First National Bank of Boston* v. *Maine* decision stood has been wiped out by these and other later decisions of the United States Supreme Court.

Before leaving this phase of the problem, let us consider two other arguments to the favor of the constitutionality of the tax in question. The State of New York, as well as many other states, levies what is denoted a stock transfer tax. See *Baldwin's New York Consolidated Laws, Ann.*, 1938, Tax Law, Art. 12, sec. 270. By the terms thereof, every transfer of stock in a New York corporation is subjected to a transfer tax. One rate of tax is applied to transfers by sale or exchange. Another rate of tax is applied to transfers by gift or bequest. This type of tax has been sustained so far as its constitutionality is concerned (see annotations to sec. 270 of New York Tax Law, *supra*), and the tax is levied and collected regardless of where the actual transfer, considering only the relations between the buyer and the seller or the donor and the donee, is consummated. See also *Curry* v. *McCanless, supra*. In other words X may sell stock in a New York corporation to Z, the entire transaction taking place in the State of Utah. Nevertheless, the corporation, when asked to transfer the stock on its books, will require the payment of the New York transfer tax. It is important to note also that different rates of tax are applied, as stated, depending upon whether the transfer is the result of a sale or a bequest.

It has long been recognized that a taxing sovereignty may tax one type of transaction or one class of individuals and not tax another type of transfer or class of individuals so long as the classification used in determining the incident of tax or upon whom the burden will fall is reasonable. See 12 *Am. Jur.* "*Constitutional Law*," secs. 476, *et seq.*; note at 58 L. ed. 1030 and cases cited.

The tax provided by Chapter 12, Title 80, Revised Statutes of Utah, 1933, may be denoted by many different terms, such as an inheritance tax, an estate tax, a death duty tax; but in the final analysis the tax is in reality a transfer tax—a tax upon the right to transfer property at death. *See State Tax Commission* v. *Backman, supra.* Certainly, it is reasonable classification for the state to say that it will tax only transfers made upon death and not transfers by sale or gift inter vivos.

If, as we feel sure, the respondents do not contest the proposition that the type of transfer tax levied by New York, as discussed above, is constitutional, then certainly there can be no constitutional or other objection to the transfer tax proposed here.

Respondents also may argue that the laws of the State of New York govern the devolution of and succession to the personal property in this case by reason of the fact that the decedent was a resident of New York. With that proposition we do not quarrel. We admit that the laws of the State of Utah can have no bearing upon the right to succession, the degrees of succession, or other determinative factors in connection with the probate of personal property belonging to this decedent's estate. From this proposition respondents may argue that, therefore, the State of Utah cannot tax a transfer of the property here concerned at death since that transfer is governed, so far as probate is concerned, by the laws of the State of New York. We submit that this argument, if made, is completely a *non sequitor. Curry* v. *McCanless, supra,* page 370 of 307 U. S., where this Court states:

> "And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another *merely because the transfer was effected by decedent's testamentary act in another state.*" (Italics ours.)

The laws of the United States of America also have nothing to do with and can have no effect upon the devolu-

tion of or succession to property, or the probate of the estate of this decedent. Yet the jurisdiction and power of the Federal Government to levy an estate or transfer tax upon the transfer of property at death, which tax is, so far as material, identical with that imposed by Utah laws, has never been doubted since the decision in *Knowlton* v. *Moore*, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

The Court's analysis of the power to levy the tax in *Knowlton* v. *Moore*, while specifically directed to upholding the jurisdiction of the Federal Government to levy an estate or inheritance tax, is pertinent and controlling here. The argument was made that since only state law could control the transfer and succession to property on death (admitted at page 58 of 178 U. S.), the National Government could not levy an estate tax upon the transfer of property at death. In answer, this Court said, at 178 U. S. 59-60:

> "But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, *and not the right existing to regulate.* In legal effect, then, *the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation,* by either the government of the United States on the one hand or the several States on the other, *the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the propostion denies the authority of the States to tax objects which are confessedly within the reach of their taxing power,* and also excludes the National Government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the

subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and state governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them." (Italics ours.)

Similarly, care should be taken here not to confuse the power to regulate with the power to tax. We are not here concerned with jurisdiction to regulate or control succession to property. We are here concerned with taxation of the transfer of property within Utah's jurisdiction.

Before concluding our argument under this point, let us consider the cases cited by respondents at page 8 of their brief in opposition to petition for writ of certiorari. Respondents assert that *First National Bank of Boston* v. *Maine, supra,* has not been overruled but has been cited with approval in the cases there listed. An analysis of these cases will disclose that in none of them is the *Maine* case used for authority upon any point other than in connection with a double taxation argument and, further, a study of each of these cases will show that in reality the authority of the *Maine* case has been successively weakened. We treat each of these cases in order.

Lawrence v. *State Tax Commission,* (1932) 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556. The *Maine* case is cited only for the proposition that the state of the domicile of the owner of intangibles may tax such domiciliary upon the

receipt of income therefrom. This point is not involved in the present case; hence distinguishable.

Burnet v. *Brooks, supra.* We have treated this case previously in this brief and submit that its principles support petitioner, not respondents.

City Bank Farmers Trust Co. v. *Schnader,* (1934) 293 U. S. 112, 79 L. ed. 228, 55 S. Ct. 29. The *Maine* case is cited only in connection with dictum, since the power of Pennsylvania to tax the transfer of paintings (tangibles) was upheld. Furthermore, it is cited in this case only for the proposition which we submit is no longer law, namely, that the Fourteenth Amendment prohibits multiple taxation.

Senior v. *Braden,* (1935) 295 U. S. 422, 79 L. ed. 1520, 55 S. Ct. 800. This case involved an ad valorem personal property tax and the *Maine* case is cited only with reference to what the majority opinion refers to as "double taxation". Note, also, the vigorous dissent, sharply criticizing this double taxation theory, by Mr. Justice Stone, joined by Justices Brandeis and Cardozo, from which we quote in part, at pages 433-434 of 295 U. S.:

> "Tax laws are neither contracts nor penal laws. The obligation to pay taxes arises from the unilateral action of government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute the burden among those who must bear it. See *Alabama* v. *United States,* 282 U. S. 502, 507. To that obligation are subject all rights of persons and property which enjoy the protection of the sovereign and are within the reach of its power.
>
> "For centuries no principle of law has won more ready or universal acceptance. Even now that it is doubted, the doubt is rested on no more substantial foundation than want of 'jurisdiction' to tax, and the assertion that the Fourteenth Amendment is endowed with a newly discovered efficacy to forbid 'double taxation' when the sovereignty imposing the tax is that of two or more states. See *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 210; *Safe Deposit &*

Trust Co. v. *Virginia,* 280 U. S. 83, 92; *Baldwin* v. *Missouri,* 281 U. S. 586, 593; compare *Burnet* v. *Brooks,* 288 U. S. 378, 400, *et seq.* But as no opinion of this Court has undertaken to define the taxation which is thus forbidden because it is double, or to declare that different legal rights founded upon the same economic interest may never, under any circumstances, be compelled to contribute to the cost of government of two states whose protection they respectively enjoy, it would seem still to be open to inquiry whether the particular tax now imposed infringes any constitutional principle capable of statement and definition." And at page 439:

"In every practical aspect—and taxation is a practical matter—the trust certificate holder stands in the same relationship to the land as the stockholder of a land-owning corporation. It is not denied that the petitioner receives as much benefit and protection from the State of Ohio with respect to his certificates as does the owner of corporate stock, or that his interest is as much within the reach of the state power. Only by resort to subtle refinements of legal doctrine, devised without reference to the problems of taxation and irrelevant to them, or by treating the Fourteenth Amendment as an instrument for giving effect to our own peculiar convictions of what is morally or economically desirable, is it possible to sustain the taxation of the one and not the other.

* * *

"Whatever name we may give to the interest taxed, Ohio is not without jurisdiction of the land, the trustee, the certificates, or the owners of them. All are within the state. The objection to double taxation by a single sovereign is no more potent under the Fourteenth Amendment than the objection that a tax otherwise valid has been doubled. See *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 72; *Magnano Co.* v. *Hamilton,* 292 U. S. 40. The imposition of a tax on a particular interest in land already taxed *ad valorem* does not infringe any constitutional immunity. *Swiss Oil Corp.* v. *Shanks,* 273 U. S. 407, 413 and cases cited."

Wheeling Steel Corp. v. *Fox,* (1936) 298 U. S. 193, 80 L. ed. 1143, 56 S. Ct. 773, involved an ad valorem property

tax. The *Maine* case is cited only on the so-called "double taxation" point; *yet the jurisdiction of West Virginia to levy the tax upon the intangibles of the foreign corporation was upheld.*

New York ex rel. Whitney v. *Graves,* (1937) 299 U. S. 366, 81 L. ed. 285, 57 S. Ct. 237. The *Maine* case is cited at 299 U. S. 372 only in summarizing appellant's argument that New York could not tax income in the form of a gain realized from the sale of a membership on the New York Stock Exchange which was owned and sold by appellant, a resident of Massachusetts. This Court then proceeded to hold *against appellant* who had tried to use the *Maine* case as authority. Hardly an affirmance of *First National Bank* v. *Maine;* Cf. *Citizens National Bank* v. *Durr, supra.*

New York ex rel. Cohn v. *Graves,* (1937) 300 U. S. 308, 81 L. ed. 666, 57 S. Ct. 466. The *Maine* case is cited at 300 U. S. 315, only in connection with this quotation, pages 314-5:

> "It would be pressing the protection which the due process clause throws around the taxpayer too far to say that because a state is prohibited from taxing land which it neither protects nor controls, it is likewise prohibited from taxing the receipt and command of income from the land by its resident, who is subject to its control and enjoys the benefits of its laws. The imposition of these different taxes, by the same or different states, upon these distinct and separable taxable interests, is not subject to the objection of double taxation, which has been successfully urged in those cases where two or more states have laid the same tax upon the same property interest in intangibles or upon its transfer at death. *Safe Deposit & Trust Co.* v. *Virginia, supra; Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312."

The grudging concession that the "double taxation" argument had been given cognizance by the Court in the cases cited, including the *Maine* case, should hardly be

classified as citation with approval. Furthermore, the quoted portion of the *Cohn* v. *Graves* opinion might well be classified as dictum, since the only question before the Court was the constitutionality of a New York income tax on the receipt of income by a New York domiciliary from rents on New Jersey real estate. See *Lawrence* v. *State Tax Commission, supra.*

Worcester County Trust Co. v. *Riley,* (1937) 302 U. S. 292, 82 L. ed. 268, 58 S. Ct. 185, cites the *Maine* case only in relation to the petitioner's contentions regarding "double taxation"; the decision of the Court was *against petitioner.* The citation is in connection with what probably was dictum in any event, since the proceedings were dismissed by this Court on the grounds that the attempted suit under the Federal Interpleader Act was in reality a suit against a State and hence violative of the Eleventh Amendment.

Colorado Bank v. *Commissioner,* (1938) 305 U. S. 23, 83 L. ed. 20, 59 S. Ct. 48. Although respondents list this case as one citing the *Maine* decision, our reading of the case does not disclose any citation of *First National Bank of Boston* v. *Maine.*

The *Maine* case is, however, cited at page 23 of the 305 U. S. report of *Guaranty Trust Co.* v. *Virginia,* (1938) 305 U. S. 19, 83 L. ed. 16, 59 S. Ct. 1, where, in an unanimous opinion, this Court upheld the taxation of income from the same trust by *two* states, saying, at pages 22 and 23 of 305 U. S.:

> "Has there been denial of Due Process——
>
> "The insistence is that the challenged assessment was upon the identical income already rightly taxed by New York; that, under numerous decisions by us, two or more states may not tax the same subject; this would amount to double taxation and infringe the Due Process clause. To support this proposition the cases noted in the margin[1] are cited. (Citing, among other cases, *First National Bank* v. *Maine*).
>
> "Those cases go upon the theory that the taxing power of a state is restricted to her confines and may

not be exercised in respect of subjects beyond them. Here, the thing taxed was receipt of income within Virginia by a citizen residing there. The mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done within her borders. After much discussion the applicable doctrine was expounded and applied in *Lawrence* v. *State Tax Commission*, 286 U. S. 276, and *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308. The attempt to draw a controlling distinction between them and the present cause, we thing, has not been successful." (Parenthetical insertion ours.)

Curry v. *McCanless, supra,* has been fully discussed in this brief; it cannot, by any stretch of the imagination, be called an affirmance of the principles of *First National Bank.*

We submit that the *Guaranty Trust Co.* v. *Virginia, Cohn* v. *Graves, Lawrence* v. *State Tax Commission, Whitney* v. *Graves* and *Burnet* v. *Brooks* cases, *supra,* definitely weaken and show the error of *First National Bank* v. *Maine;* further, that these decisions are, in principle at least, favorable to petitioner's case at bar. We submit that *Wheeling Steel Corp.* v. *Fox, supra,* is not in point, but, if in point, is in principle favorable to petitioner. The other cases treated are obviously distinguishable. These cases serve, however, to illustrate further what we here urge—that this Honorable Court has gradually pulled away from the error of the *First National Bank* case until finally, in *Curry* v. *McCanless, Graves* v. *Elliott, Newark Fire Insurance Co.* v. *State Board of Tax Appeals, supra,* and other cases herein discussed, the whole superstructure of that decision comes tumbling down to again disclose what the court now builds upon—the firm foundation of fundamentals in applying the test of due process of law. Tested by those fundamentals, free from glossary and paraphrasing, this tax by the State of Utah is highlighted, free from constitutional objections.

We, therefore, urge that this Honorable Court re-examine *First National Bank of Boston* v. *Maine, supra,* specifically reverse that decision and hold valid and constitutional the levy of the estate tax by the State of Utah under the circumstances of this case.

CONCLUSION

It is respectfully presented that the Supreme Court of the State of Utah erred in holding unconstitutional the levy of the tax in the case at bar and that this Honorable Court should reverse that decision.

Respectfully submitted,

J. LAMBERT GIBSON,
GARFIELD O. ANDERSON,
Counsel for Petitioner.

APPENDIX A.

Chapter 12, Title 80, Revised Statutes of Utah, 1933, As Amended by Chapter 88, Laws 1935

Section 80-12-2:

A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, whether a resident or nonresident of this state:

Three per cent of the amount by which the net estate exceeds $10,000 and does not exceed $25,000;.

Five per cent of the amount by which the net estate exceeds $25,000 and does not exceed $75,000;

Eight per cent of the amount by which the net estate exceeds $75,000 and does not exceed $125,000;

Ten per cent of the amount by which the net estate exceeds $125,000; *provided,* at the discretion of the tax commission, the taxpayer may choose to pay in kind on an estate or any portion thereof which is not liquid.

Section 80-12-3:

The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any other state or country, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death.

Section 80-12-9:

Where any property belonging to a foreign estate is subject to the payment of the tax herein provided for, such tax shall be assessed upon the market value of such property remaining after the payment of such debts and expenses as are chargeable to the property under the laws of this state, and, in the event that the executor of such foreign estate files with the clerk of

the court in this state having ancillary jurisdicti
statements in writing exhibiting the true market va
of the entire estate of the decedent, and the amount
indebtedness for which the decedent has been adjud
liable at the time of his death in other jurisdictio
which statements shall be in affidavit form and sw
to by such executor, there shall also be deducted su
proportion of the said indebtedness of the deced
from the value of the property within this state as
value of the property within this state bears to
value of the entire estate; *provided*, that in all su
cases where the property within this state consists
personal property only, the statements hereinbef
provided for shall also be filed with the state tax co
mission.

Section 80-12-34:

If an executor shall assign or transfer any c
porate stock or obligations standing in the name o
decedent, or in trust for a decedent, liable to tax he
under, the tax shall be paid to the state tax commissi
on or before the transfer thereof; otherwise, the c
poration permitting its stock or obligations to be
transferred shall be liable to pay such tax, and it is
duty of the state tax commission to enforce the pa
ment thereof.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 814

THE STATE TAX COMMISSION OF UTAH,

Petitioner;

vs.

MALCOLM P. ALDRICH AND MARY S. HARKNESS, ADMINISTRATORS WITH THE WILL ANNEXED OF THE ESTATE OF EDWARD S. HARKNESS, DECEASED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH.

REPLY BRIEF OF PETITIONER.

J. LAMBERT GIBSON,
GARFIELD O. ANDERSON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 814

THE STATE TAX COMMISSION OF UTAH,
Petitioner,

vs.

MALCOLM P. ALDRICH AND MARY S. HARKNESS,
ADMINISTRATORS WITH THE WILL ANNEXED OF THE ESTATE OF EDWARD S. HARKNESS, DECEASED.

REPLY BRIEF OF PETITIONER.

In this reply brief, petitioner desires to answer only one point raised in respondents' brief—that of the effect and applicability of the Uniform Stock Transfer Act as enacted into Utah law.

We submit that, first, the question of the effect and applicability of that Act is solely and exclusively a question for the Supreme Court of the State of Utah and, second, that the provisions of that Act are wholly irrelevant, have no bearing upon and were never intended to apply to taxation questions.

I.

Effect and Applicability of Uniform Stock Transfer Act Solely for Decision of Utah Supreme Court.

Counsels' argument appearing at pages 41 to 48 of respondents' brief concerning the Uniform Stock Transfer Act is but a summary of the same argument made to the Supreme Court of the State of Utah in this case. In the Supreme Court of Utah, the instant case and the case of *Untermyer* v. *State Tax Commission*, (1941) — Utah —, 116 P. (2d) 926, were argued together as companion cases, although never consolidated. Counsel for respondents in the instant case, both by his brief in the Utah Supreme Court and in oral argument before that Court, adopted the brief of counsel for the Untermyer Estate as to questions of Utah law and confined the brief in the instant case in the main to the Federal Constitutional question. In the Untermyer brief the attempt was made to have the Utah Court place weight and reliance on the opinions of the Uniform Stock Transfer Act as adopted into Utah Statutes. Over fifty printed pages of the Untermyer brief (adopted, as stated, by counsel for petitioners here) were devoted to the Uniform Stock Transfer Act provisions in Utah law. The question was covered in a reply brief by the Tax Commission and was argued extensively in oral argument. Therefore, we submit that the Utah Court had that question before it, and has decided it adversely to the respondents. See decision in instant case, — Utah —, 116 P. (2d) 923 and *Untermyer* v. *State Tax Commission*, — Utah —, 116 P. (2d) 926. The question is conspicuous by its absence from comment in the majority decision of the Utah Supreme Court. By that intentional omission, the Utah Court has indicated its decision that

the provisions of the Uniform Stock Transfer Act have no materiality with, no application to, no bearing on the question of whether Utah's laws intend to levy the tax under the circumstances of the case at bar. The question having been so completely presented to the Utah Court, and being one for the exclusive determination of that court, we regret counsels' attempt to inject it into the argument before this Court.

The question of whether Utah's laws do levy the tax is one of statutory construction for the Supreme Court of Utah. This question has been decided by that Court in the affirmative. See 116 P. (2d) 923 and 116 P. (2d) 926.

Furthermore, counsel for respondents admit this position in the first part of their brief, and then, strangely seem to indicate some desire to retract the admission at pages 41 to 48. At pages 3-4 of their brief, respondents say:

> "Respondents concede that the Utah tax in question is an estate or transfer tax *and that the provisions of the tax statute were intended to be broad enough to reach shares of stock of Utah corporations owned by non-resident decedents. Consequently, if the State of Utah could constitutionally tax the testamentary transfer of the shares of the Union Pacific Railroad Company owned by Mr. Harkness, it has done so by its Inheritance Tax Law in effect at the time of his death.*" (Italics ours.)

We present that *this* is a correct statement of the nature of the problem presented to this Honorable Court—that the Utah Supreme Court has decided *all* questions of state statutory interpretation and application, holding that the tax is levied by Utah law, subject only to the question of the constitutionality of the tax so levied, on which only this Court can pronounce judgment.

We believe that this Court will accept as conclusive the interpretation by the Utah Supreme Court of its own state statutes and the applicability thereof.

Missouri, ex rel Hurwitz v. *North* (1926) 271 U. S. 40, 70 L. Ed. 818, 46 S. Ct. 384;

Dorchy v. *Kansas* (1926) 272 U. S. 306, 71 L. Ed. 248, 47 S. Ct. 86;

Ex parte Worcester County National Bank of Worcester (1929) 279 U. S. 347, 73 L. Ed. 733, 49 S. Ct. 368;

Guaranty Trust Company of New York v. *Blodgett*, (1933) 287 U. S. 509, 77 L. Ed. 463, 53 S. Ct. 244;

Nickey v. *Mississippi* (1934) 292 U. S. 393, 78 L. Ed. 1323, 54 S. Ct. 743;

Alabama v. *King and Boozer* (1941) — U. S. —, 86 L. Ed. Adv. Op. 1, — S. Ct. —.

We earnestly submit, therefore, that the question of whether the Uniform Stock Transfer Act, as enacted into Utah statutory law (Chapter 3, Title 18, Revised Statutes of Utah, 1933), has any bearing on the problem presented by the case at bar, is not properly before this Honorable Court and should not be considered in the determination by this Court.

II.

The Provisions of the Uniform Stock Transfer Act, as Adopted Into Utah Law, Have No Application to the Case at Bar.

Without retracting from the position set forth under Point I hereof, but solely for the purpose of demonstrating the fallacy of respondents' argument based upon the Uniform Stock Transfer Act, fallacies pointed out to and adopted by omission by the Utah Supreme Court, we respectfully present very briefly the following points.

(1) The statutory provisions contained in the Uniform Stock Transfer Act relate to and were intended to cover only the commercial phases of stock transfers. They are intended, as was the Negotiable Instruments Law in connection with bills and notes, to provide for certain uniform rules governing the method of transferring certificates of stock and making such certificates more readily negotiable in the commercial marts. See *Lillie v. First Federal Savings & Loan Association,* (La., 1940) 194 So. 903; see also *Uniform Laws Annotated,* (1922), Volume 6 and 1940 Cumulative Annual Pocket Part, especially the preface thereto and the case notes to section 1. Nowhere in the Act will any reference be found to taxation in any form.

Counsel refers to this Uniform Act as attempting to enact into statutory law, the mercantile theory of stock certificates. So, also, did the Negotiable Instruments Law attempt to enact the mercantile theory of bills and notes into law, yet counsel would not have us conclude that the State of the holder's domicile, for example, could not tax the transfer at death of a note, even though the paper were located in another State? Counsel's whole theory of the supremacy of the domiciliary State's jurisdiction would be blasted by such a theory and, therefore, neither would counsel admit that the domiciliary State loses its tax jurisdiction over the estate of the owner of stock, though the certificate may be elsewhere. And what happens to counsel's position as to double taxation if we apply the Uniform Stock Transfer Act provisions to inheritance tax cases? The domiciliary State could tax, of course, says counsel. But, apply the Uniform Act, and so could the State where the piece of paper was located. We submit that the Uniform Stock Transfer Act has no application to taxation problems.

(2) Counsel's treatment of the Uniform Stock Transfer Act fails to disclose a single case dealing with death duty taxes or, for that matter, taxes in any form in relation to the Uniform Stock Transfer Act. We state this in spite of the citation of the case of *Newell* v. *Tremont Lumber Company*, 161 La. 649, 109 So. 344. This case has been discussed in our brief at page 28 and we treat it again here only because we wish to emphasize our disagreement with the interpretation counsel for respondents would put on that case. An analysis of this case will disclose that it was decided in 1926. Louisiana, as will also be disclosed by reference to the case itself, adopted its Inheritance Tax Law in 1921 but had adopted the Uniform Stock Transfer Act in 1914. Thus, even conceding for the sake of argument that the Uniform Stock Transfer Act could have any amendatory effect upon an inheritance tax law, the Louisiana case would have no bearing on the case at bar because the later law, namely, the Inheritance Tax Law of Louisiana, would then have to be interpreted in light of statutes previously enacted. This we believe will be accepted as a cardinal rule of statutory construction, namely, that a later act is to be interpreted in the light of statutes already in existence, and further, that statutes already in existence are not amended by a later act unless that act specifically or by necessary implication amends the previous statutes. There is nothing in the later Uniform Stock Transfer Act which specifically or by necessary implication changes, modifies or amends in any way the earlier Utah Inheritance Tax Law. Stock transfers factually identical with those in the case at bar were taxed and the taxation thereof upheld prior to 1932 under the same statute as now exists in Utah. See instant decision, 116 P. (2d) 923. Furthermore, the inheritance tax statute of Louisiana taxed only the transfer of property "*physically*" in the State of Louisiana. The use of the word "physically" must

have been intentional. The Utah statute contains no such limiting or qualifying phrase. Even the quotation from the case cited by counsel for respondents at pages 46-47 of their brief demonstrates the stress placed upon the word "physical". Without that word in the statute, the decision might very well have gone the other way.

We, therefore, maintain that the complete absence of any adjudicated case dealing with or recognizing in any way any connection between the Uniform Stock Transfer Act and death duty taxation, in fact taxation in any form, can mean only one thing—that the Uniform Stock Transfer Act was never intended and has never been thought to have any bearing upon taxation. *Mills* v. *Jacobs*, (1939) 333 Pa. 231, 4 Atl. (2d) 152, 155.

(3) The Uniform Stock Transfer Act, we submit, applies only to *inter vivos* transactions. By the very terms of the Act itself an executor or administrator of an estate cannot transfer the property represented by the certificate without authority of the probate court having jurisdiction of the administration of the estate of the deceased owner. See Sec. 18-3-2, Revised Statutes of Utah, 1933. We are not here dealing with taxation of *inter vivos* transactions in stock but are dealing with the taxation of transfers coming within the terms of our Inheritance Tax Law. Counsel for respondents concede this point, also, at page 46 of their brief. The quotation from Professor Beale adds nothing to respondents' position, for that quotation by its very terms, shows that the Uniform Stock Transfer Act has *not* been applied to problems of estate administration.

(4) If the intent of the Utah Legislature in adopting the Uniform Stock Transfer Act, as counsel for respondents would have us believe upon no authority but their own arguments, was to strip Utah of all jurisdiction for all purposes over shares of stock of domestic corporations, would it not

have been a simple matter for the legislature to have specifically so stated somewhere in the statutes adopting those provisions into Utah law? The complete absence of any such specific relinquishment of jurisdiction, and, we submit, the complete absence of any fairly reasoned inference of relinquishment of jurisdiction for tax purposes, at least, conclusively demonstrates that no such intent is to be read into those statutory provisions. On the contrary, statutory provisions evidencing conclusively a contrary intent were on the Utah statute books long before adoption of the Stock Transfer Act and have remained there since. See especially sections 18-2-32, 80-12-34, 80-12-38, 80-12-2, 80-12-3, Revised Statutes of Utah, 1933.

(5) The Utah death duty tax law was adopted in 1901. It has remained on the statute books of that State unchanged, so far as material to the present case, from that date to the present time. The State of Utah assessed and collected inheritance tax upon the transfer of stock in identical factual situations until 1932. The Uniform Stock Transfer Act was adopted by the State in 1927; yet during the five years following the adoption of the Uniform Stock Transfer Act, during which inheritance taxes on similar transfers were collected, no one judicially raised or contended for the proposition that the Inheritance Tax Law had been amended by the adoption of the Uniform Stock Transfer Act so as to exclude from inheritance taxation the transfer of stock in domestic corporations owned by nonresidents. The only reason that the State of Utah ever ceased the levy and collection of the tax in situations such as the present was the interposition by the Supreme Court of the United States of its decision in *First National Bank of Boston* v. *Maine* (1932), 284 U. S. 312, 76 L. Ed. 313, 52 S. Ct. 174, which, as we have demonstrated in our main brief, is no longer law. See decision in instant case, 116 P. (2d) 923.

(6) Counsel for respondents fail to analyze another feature of the claimed effect of the Uniform Stock Transfer Act. New York adopted the Uniform Stock Transfer Act in 1913; yet New York assessed and collected its death duty tax upon the transfer of shares of stock of domestic corporations owned by nonresident decedents for many years subsequent to the enactment of the Uniform Stock Transfer Act. See *In re Brett's Estate*, 205 N. Y. S. 154, 42 A. L. R. 365. Massachusetts adopted the Uniform Stock Transfer Act in 1910; yet at least three cases found in the list of cases at 42 A. L. R. 365, demonstrate that Massachusetts also continued to assess and collect its death duty tax in similar situations for many years subsequent to the adoption of that act. Similarly, New Jersey adopted the Uniform Stock Transfer Act in 1916; yet at least six cases cited at 42 A. L. R. 366, establish that New Jersey also assessed and collected its death duty tax under identical factual situations after the adoption of that act. Pennsylvania adopted the Stock Transfer Act in 1912; yet *Schuylkill Trust Company* v. *Pennsylvania*, (1938), 302 U. S. 506, 82 L. Ed. 392, 58 S. Ct. 295, held Pennsylvania's jurisdiction to tax all shares of domestic corporations valid and constitutional. Tennessee adopted the Uniform Stock Transfer Act in 1925. Yet in *Curry* v. *McCanless*, (1939) 307 U. S. 357, 83 L. Ed. 1339, 59 S. Ct. 900, Tennessee was permitted by this Court to tax the transfer at death of stock, the certificates representing which were physically in Alabama—without any apparent difficulty by reason of the Uniform Stock Transfer Act. Alabama also adopted that act in 1931. (For reference to the statutory provisions of the various States having enacted the Uniform Stock Transfer Act, showing also the date of enactment, see page 6 of the 1940 Cumulative Annual Pocket Part to Uniform Laws Annotated, Volume 6.)

The cited examples are merely indicative of the unanimity of the decided cases from state jurisdictions having adopted the Uniform Stock Transfer Act demonstrating the total inapplicability of Uniform Stock Transfer Act to problems of taxation. We are not here asserting jurisdiction over shares of stock in domestic corporations of Utah for purpose of garnishment; nor for purpose of suits by adverse claimants to title to the shares; nor for any purpose other than taxation. Jurisdiction may have been ceded away by Utah for some *limited* purposes, but not for taxation purposes. In fact, we submit that jurisdiction has been ceded away by Utah only for those *limited* purposes *specifically* set forth in the Act. Taxation is not one of them. We assert only jurisdiction in the State of Utah over the shares of stock of domestic corporations for taxation purposes. As was so aptly stated in *Mills* v. *Jacobs, supra,* at 4 Atl. (2d) 155, where the court was referring to situs of shares for purposes of taxation:

> "But this doctrine is not applicable here, for it is evident that the situs for purposes of taxation and the situs for purposes of attachment may differ. Guaranty Trust Co. of New York *v.* Fentress, 7 Cir., 61 F. (2d) 329, 334. This is conclusively shown by the fact that even prior to 1911, when no foreign shares were subject to attachment in Pennsylvania since the situs for that purpose was regarded as being at the domicile of the corporation, nevertheless such shares were taxable in this state on the theory that the situs for tax purposes was at the domicile of the owner. McKeen *v.* County of Northampton, 49 Pa. 519, 88 Am. Dec. 515; In re Short's Estate, 16 Pa. 63."

Conclusion.

We, therefore, respectfully present that the Uniform Stock Transfer Act and counsels' arguments based thereon, not only are improperly presented to this Court but further have no bearing on the issues in the case at bar.

J. Lambert Gibson,
Garfield O. Anderson,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 914

THE STATE TAX COMMISSION OF UTAH,

Petitioner,

against

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased,

Respondents.

BRIEF FOR RESPONDENTS.

MELBER CHAMBERS,
HENRY G. GRAY,
Counsel for Respondents.

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Supreme Court of the United States,

OCTOBER TERM, 1941.

No. .....

THE STATE TAX COMMISSION OF UTAH,
Petitioner,
against
MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased,
Respondents,

BRIEF FOR RESPONDENTS.

This brief is submitted in opposition to a petition for a writ of certiorari to review the decision of the Supreme Court of Utah holding that the shares of stock of the Union Pacific Railroad Company, a Utah corporation, owned at the time of his death by Edward S. Harkness, a resident of New York, are not subject to the Utah Estate Tax.

The Facts.

There is no issue of fact in this case.

The statement of facts contained in the petition is correct as far as it goes, but it is incomplete. Only the additional facts will be stated here.

The decedent was never domiciled in Utah and never carried on any business in that state (R. 3).

The certificates representing the shares of Union Pacific Stock in question were always kept in New York and were never used in connection with any business carried on by anyone in Utah (R. 3).

While the shares of stock were registered in the decedent's name, as stated in the petition, the books of the Union Pacific Railroad Company which contained the record of that ownership were at all times kept in New York. Indeed, the only stock books and stock records kept by the Railroad Company had been located in New York for many years. In that state was the only office for the transfer of its shares of stock (R. 2). It has, of course, been within the power of the Railroad Company to keep stock books in Utah and record transfers there, but it has not done so (R. 2, 14).

Although the Union Pacific is a Utah corporation and holds its annual meeting of stockholders there, its executive offices are located in New York and its Board of Directors meets there. Only a very small portion of its property is in Utah; less than ten per cent. of its revenue comes from business transacted in Utah; less than nine per cent. of its trackage is in that state (R. 2).

In connection with the credit allowed by the State of New York against the estate tax paid to it, the New York tax authorities have taken the position that a tax such as the one here in question is not constitutionally valid and that consequently no credit is allowable against the New York tax (R. 4).

The Question Presented.

The question presented for review is whether upon the facts in this case the State of Utah could, without violation of the Federal Constitution, tax the transfer of the shares of stock in the Union Pacific Railroad Company, a Utah corporation, resulting from the death of the shareholder, Edward S. Harkness, who died a resident of New York.

The Reasons Relied On By Petitioner For Allowance of Writ.

In its petition the petitioner has assigned the following reasons for the allowance of a writ of certiorari:

First, that the decision of the Utah Supreme Court is "not in accord with the applicable decisions of this Court";

Second, that the Utah Supreme Court in its decision has misconstrued the Constitution of the United States and the applicable decisions of this Court;

Third, that the constitutional question presented is of general importance and concern to the states and to taxpayers and should be decided by this Court.

From the second reason must be eliminated the suggestion that the Utah Supreme Court has misconstrued the Constitution of the United States. That court's opinion makes it plain that no interpretation of the Constitution was attempted. Rather, the decision of this Court in *First National Bank of Boston* v. *Maine*, 284 U. S. 312 was held to control (R. 25).

With that portion of the second reason gone, the remaining reasons are reduced to one. Petitioner in substance urges that in deciding the important question presented, the Utah Supreme Court has failed to interpret properly the applicable decisions of this Court.

We submit that it is perfectly plain that a correct interpretation of this Court's decisions has been made by the Utah Supreme Court and that there is no reason for the granting of a writ of certiorari.

POINT I.

The Utah Supreme Court has correctly held that the question here presented was decided by this Court in First National Bank of Boston *v.* Maine.

The identical question presented here was decided by this Court in *First National Bank of Boston* v. *Maine*, 284 U. S. 312.

In that case an appeal was taken by the executors of an estate from a judgment of the Supreme Judicial Court of Maine sustaining a succession tax imposed by the State of Maine upon shares of stock in a Maine corporation owned by a non-resident decedent.

The decedent died testate, a resident of Massachusetts. The greater portion of his estate consisted of shares of stock in the Great Northern Paper Company, a Maine corporation, which had most of its assets in Maine. His will was probated in Massachusetts where an inheritance tax of $32,000 was assessed and paid upon the net estate. Ancillary administration was taken out in Maine and an inheritance tax of $62,000 was assessed there upon the transfer of the shares of the Great Northern Paper Company with a credit upon this amount for the tax paid in Massachusetts. Upon these agreed facts the State of Maine brought an action of debt which was referred for final decision to the Supreme Judicial Court of that state, sitting as a law court.

Revised Statutes Maine, c. 69, § 1, then in force, provided in part

> "All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, * * * shall be subject

to an inheritance tax for the use of the state as hereinafter provided * * * ".

Section 25 of the same chapter in substance provided that the tax on transfers of stock owned by non-residents and taxable under the statute should be paid at the time of the transfer.

The Maine court held that the shares of stock were "within its [that state's] jurisdiction and there subject to an inheritance tax * * * regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in the taxing state", without thereby infringing the due process clause of the Fourteenth Amendment.

This Court reversed the decision of the Maine court and held the tax to be unconstitutional. In doing so it decided first, that only one state could, within the provisions of the due process clause of the Fourteenth Amendment, assess a tax upon the transfer by death of the shares of stock in question and second, that the state with the requisite jurisdiction to impose the tax was the state of the decedent's domicile.

This Court first reviewed its decisions in which the jurisdiction of the states to tax the inheritance of property had been defined. It was pointed out that it had long ago been established that real property is subject to an inheritance tax only in the state in which it is located. Later it had become settled that the same rule applied to tangible personal property (*Frick* v. *Pennsylvania*, 268 U. S. 473). Then, in three decisions in 1930 the principle of single taxation had been applied to three kinds of intangibles: bonds, notes and credits. (*Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm.*, 282 U. S. 1.)

With that prelude this Court proceeded to hold that this principle is broader than the applications thus far made of it and that it governed the taxation of the in-

inheritance of shares of stock as well. The basis for that conclusion was this (p. 327):

> "A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states."

The one state possessing the jurisdiction to tax was decided to be the domicile of the decedent, for, (p. 330):

> "* * * Practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile; and these considerations are greatly fortified by the fact that a large majority of the states have adopted that rule by their reciprocal inheritance tax statutes. In some states, indeed, the rule has been declared independently of such reciprocal statutes. The requirements of due process of law accord with this view."

That was the first time the question had been squarely presented to this Court. In none of the three earlier cases cited by the petitioner in the case at bar (*Maxwell v. Bugbee*, 250 U. S. 525; *Frick* v. *Pennsylvania*, 268 U. S. 473; *Rhode Island Hospital Trust Company* v. *Doughton*, 270 U. S. 69) had the power of the state of incorporation to tax been questioned by either party and it had been simply assumed to exist by the court.

POINT II.

The decision in First National Bank of Boston *v.* Maine is eminently sound.

That decision is harmonious with three different approaches to the problem, which have appeared in decisions of this Court. First, it supports the doctrine of the single

tax. Second, it conforms with the application of the maxim, *mobilia sequuntur personam*. Third, it embraces the point of view that we must look at the thing to be taxed and then permit its taxation in the place where it is afforded some benefit or protection.

Application of the decision to the case at bar demonstrates its soundness.

Of course, the shares of stock owned by Mr. Harkness were created and continued in existence by the law of Utah. Sensibly it could be argued, then, that the shares are subject to taxation by that State—a property tax laid upon them could be justified. *Corry* v. *Baltimore*, 196 U. S. 466; *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506.

We are now concerned, not with a property tax imposed upon the shares by Utah, but rather a tax aimed at a transfer of the shares resulting from the death of the owner. That is an entirely different thing. A state might well create and give protection to intangible property rights and yet have nothing to do with their transfer upon the death of the owner. That is precisely what has happened in this case.

The decedent here died a resident of New York. Neither he nor his shares ever "resided" in Utah or were ever connected with any business in Utah. His will was probated in New York. The interests of his beneficiaries were determined by the law of New York. There the succession took place.

As a practical matter, too, the shares are transferable on the books of the company kept in New York. No transfer books are maintained in Utah. Thus the transfer, the thing sought to be taxed by Utah, in all its aspects, was effected in New York by the death of one domiciled there.

Once created, the shares had acquired the incident of transferability on the death of the owner. That incident could not thereafter be impaired by Utah. Its transfer on the owner's death would take place wherever he was domiciled at the time of his death and would be effected by the law of that place, unaided by the law of Utah.

POINT III.

The decision in First National Bank of Boston *v.* Maine stands unimpaired by later decisions of this Court.

1. *First National Bank of Boston* v. *Maine* has been neither overruled nor disavowed in any subsequent decision of this Court.

2. On the contrary, it has been repeatedly referred to as setting forth the law of the land as to the jurisdiction of the states to impose death taxes on shares of stock.

The case has been cited by this Court in the following cases:

Lawrence v. *State Tax Comm.*, 286 U. S. 276;
Burnet v. *Brooks*, 288 U. S. 378;
City Bank Farmers Trust Co. v. *Schnader*, 291 U. S. 24, 293 U. S. 112;
Senior v. *Braden*, 295 U. S. 422;
Wheeling Steel Corp. v. *Fox*, 298 U. S. 193;
New York ex rel. Whitney v. *Graves*, 299 U. S. 366;
New York ex rel. Cohn v. *Graves*, 300 U. S. 308;
Worcester County Trust Co. v. *Riley*, 302 U. S. 292;
Colorado Bank v. *Commissioner*, 305 U. S. 23;
Curry v. *McCanless*, 307 U. S. 357.

In *Senior* v. *Braden*, *supra*, while distinguishing a case this Court said (p. 432):

> "* * * The opinion accepted and followed the doctrine of *Blackstone* v. *Miller*, 188 U. S. 189, and *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54. Those cases were disapproved by *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204. They are not in harmony with *Safe Deposit & Trust Co.* v. *Vir-*

ginia, 280 U. S. 83, and views now accepted here in respect of double taxation. See *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n.*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312."

In *Worcester County Trust Co.* v. *Riley, supra*, the present Chief Justice, writing for a unanimous court said (p. 98):

"* * * This Court has held that state statutes, construed to impose death taxes upon the intangibles of decedents domiciled elsewhere, infringe the Fourteenth Amendment, and it has accordingly reversed judgments of state courts enforcing such liability. *First National Bank* v. *Maine, supra; Farmers Loan & Trust Co.* v. *Minnesota, supra.*"

In *Curry* v. *McCanless*, 307 U. S. 357 and *Graves* v. *Elliott*, 307 U. S. 383, the majority of this Court in two five-to-four decisions held that an inheritance tax might be imposed on intangibles by a state in which a decedent had placed them in a trust, as well as by the state of the decedent's domicile. Thus it was decided that not every case would permit the application of the single tax rule. The minority of the court disagreed and held that the state of domicile must yield to the state of business situs.

However, in writing for the majority of the court in *Curry* v. *McCanless*, Chief Justice Stone again referred to the authority of the *Maine* case and, while declining to apply the single tax rule to the circumstances of the case before the court, he reaffirmed the application of the rule made in the *Maine* case, in *Farmers Loan & Trust Co.* v. *Minnesota, supra*, and in *Baldwin* v. *Missouri, supra*. He said (p. 363):

"The doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state has received support to the limited extent that it was applied in *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586;

First National Bank v. *Maine*, 284 U. S. 312. Still more recently this Court has declined to give it completely logical application. It has never been pressed to the extreme now urged upon us, and we think that neither reason nor authority requires its acceptance in the circumstances of the present case."

3. The decisions in the *Curry* and *Graves* trust cases are sharply distinguishable from the case at bar.

Mr. Harkness kept the certificates at his domicile; he never gave them a business or other situs elsewhere. Furthermore, and more important, he retained in himself the full title and ownership in the shares. He did not transfer some interest in them, legal or equitable, to another in some other state.

In *Curry* v. *McCanless* and *Graves* v. *Elliott* the decedents created trusts and transferred to trustees in a state other than the domicile the legal title and control of the securities. They thus voluntarily subjected the property and its succession on their death to the jurisdiction of that other state. Those cases are akin to the ones in which intangibles are used in connection with a business elsewhere than at the owner's domicile—cases of business situs. But such elements are absent from the case at bar.

4. There is nothing in principle or in the recent decisions of this Court calling for a reconsideration of the decision in the *Maine* case.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MELBER CHAMBERS,
HENRY G. GRAY,
Counsel for Respondents.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 814

THE STATE TAX COMMISSION OF UTAH,

Petitioner,

vs.

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased,

Respondents.

BRIEF FOR RESPONDENTS

MELBER CHAMBERS,
Counsel for Respondents.

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IN THE

Supreme Court of the United States,

OCTOBER, TERM, 1941

No. 814

THE STATE TAX COMMISSION OF UTAH,
Petitioner,

vs.

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased,
Respondents.

BRIEF FOR RESPONDENTS

The question presented for review is whether upon the facts in this case the State of Utah could, without violation of the Fourteenth Amendment, tax the testamentary transfer of the shares of stock in the Union Pacific Railroad Company, a Utah corporation, taking place upon the death of the shareholder, Edward S. Harkness, who died a resident of the State of New York.

Statement of the Case

There is no issue of fact in this case.

The statement of the case contained in the petitioner's brief is correct as far as it goes, but it is incomplete. Only the additional facts will be stated here.

The decedent was never domiciled in Utah and never carried on any business in that state (R. 3).

The certificates representing the shares of Union Pacific stock in question were always kept in New York and were never used in connection with any business carried on by anyone in Utah (R. 3).

While the shares of stock were registered in the decedent's name, as stated in the petitioner's brief, the books of the Union Pacific Railroad Company which contained the record of that ownership were at all times kept in New York. Indeed, the only stock books and stock records kept by the Railroad Company had been located in New York for many years. In that state was the only office for the transfer of its shares of stock (R. 2). It has of course been within the power of the Railroad Company to keep stock books in Utah and record transfers there, but it has not done so and there is no requirement in the law of Utah that it do so (R. 2, 14).

Although the Union Pacific is a Utah corporation and holds its annual meeting of stockholders there, its executive offices are located in New York and its Board of Directors meets there. Only a very small portion of its property is in Utah; less than ten per cent. of its revenue comes from business transacted in Utah; less than nine per cent. of its trackage is in that state (R. 2).

In connection with the credit allowed by the State of New York against the estate tax paid to it, the New York tax authorities have taken the position that a tax such as the one here in question is not constitutionally valid and that consequently no credit is allowable against the New York tax assessed against the Harkness estate (R. 4).

SUMMARY OF ARGUMENT

POINT I. The nature and scope of the Utah Inheritance Tax Law.

POINT II. Antecedents of *First National Bank* v. *Maine*.

POINT III. The question presented in the case at bar has already been decided by this Court in *First National Bank* v. *Maine*.

I. Consideration of that decision.

II. Reliance upon that decision by Federal and State courts.

POINT IV. The authority of *First National Bank* v. *Maine* stands unimpaired by later decisions of this Court.

1. That decision has not been overruled.
2. Its citation by this Court as an authority.
3. The later decisions relied on by petitioner considered and distinguished.

POINT V. No principles have been enunciated by this Court which cast doubt on the soundness of the decision in *First National Bank* v. *Maine*.

POINT VI. The Uniform Stock Transfer Act and the trend of modern decisions apart from that Act adopting the mercantile concept of shares of stock are additional reasons for applying the decision in *First National Bank* v. *Maine* to the case at bar.

POINT I

The Nature and Scope of the Utah Inheritance Tax Law

Respondents concede that the Utah tax in question is an estate or transfer tax and that the provisions of the tax statute were intended to be broad enough to reach shares of stock of Utah corporations owned by non-resident decedents. Consequently, if the State of Utah could constitu-

tionally tax the testamentary transfer of the shares of the Union Pacific Railroad Company owned by Mr. Harkness, it has done so by its Inheritance Tax Law in effect at the time of his death.

POINT II

Antecedents of First National Bank *v.* Maine

I

The problem of the scope of the state's power to tax has engaged the attention of this Court since the early days of the Republic. Long before the coming of the Fourteenth Amendment the Court considered the nature and extent of the right of taxation which was an incident of state sovereignty (*McCulloch* v. *Maryland*, 4 Wheat. (U. S.) 316 (1819). It was pronounced by Chief Justice Marshall that "all subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation" (id. p. 429). For a time after the ratification of the Fourteenth Amendment in 1868 this Court still described unacceptable tax statutes as attempting an extra-territorial effect. Thus there was the oft-quoted passage from *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300, decided in 1872:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. * * * Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. * * *. The bonds issued by the railroad company in this case are undoubtedly property, but property in

> the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The Law * * * is not, therefore, a legitimate exercise of the taxing power."

Soon after the turn of the century, however, the due process clause began to appear in the opinions of this Court, as it outgrew its narrow Civil War significance. Excess in the exercise of a state's taxing power was said to violate the due process clause in the Fourteenth Amendment.

Louisville, etc. Ferry Co. v. *Kentucky*, 188 U. S. 385 (1903);

Delaware L. etc. RR Co. v. *Pennsylvania*, 198 U. S. 341 (1905).

Both as respects property taxes and inheritance taxes it came to be held that the subject of the tax had to be within the state. The situs of the property had to be in the taxing state.

Rhode Island Hospital Trust Co. v. *Doughton*, 270 U. S. 69, 80 (1926).

Underlying the requirement of situs was not only the idea that the state's power ceased at its borders but also the concept that any tax is based upon something given by the taxing authority in return for the tax. The *quid pro quo* for the tax is the protection and other benefits given to the property or the person taxed. (See *Union Transit Co.* v. *Kentucky*, 199 U. S. 194).

About the situs of real property there was never any question. Its situs was fixed. Thus it has always been recognized that a state may not lay a property or an inheritance tax upon land situated outside of the state.

Senior v. *Braden*, 295 U. S. 422, 429 (1935);

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193, 208 (1936);

See *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 204 (1905).

About tangible personal property there was at first some doubt in the decisions of the various state courts where the question arose. The maxim *mobilia personam sequuntur* was for a time thought to exclude tangible personal property from the taxing jurisdiction of the state where it had acquired a permanent location. But this Court settled the question many years ago and held that tangible personal property might be subjected to taxation by the state where it was situated, that is, by the state of the situs of the property.

Brown v. *Houston*, 114 U. S. 622 (1885);
American Steel & Wire Co. v. *Speed*, 192 U. S. 500 (1904).

It was of course intangible personal property which caused the real difficulty. Where was it taxable? And with the great growth in the complexity of living and the creation of new forms of intangible property, the perplexity of the problem increased apace.

At first, applying the maxim *mobilia*, the taxable situs of intangibles was fixed at the domicile of the owner.

Kirkland v. *Hotchkiss*, 100 U. S. 491 (1879).

Thus far in the development of the jurisdiction of the states to tax there was no question of double taxation. Tangibles were taxable where they were physically located. Intangibles were taxable at the domicile of their owner.

Then came the first exception to the application of the maxim *mobilia*. That was in the cases of business situs. When an intangible became connected with a business at some other place than the domicile of the owner, it was said to have acquired a taxable situs there.

New Orleans v. *Stempel*, 175 U. S. 309, (1899);
Bristol v. *Washington County*, 177 U. S. 133, (1900);
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U. S. 395, (1907);

Buck v. *Beach*, 206 U. S. 392, (1907);
Liverpool Ins. Co. v. *Orleans Assessors*, 221 U. S. 346 (1911).

This was followed by a recognition of a taxable situs at the place where a bond or note was permanently kept, even if that place was not the domicile of either the debtor or the creditor. So those intangibles represented by specialties were to that extent treated as chattels.

Wheeler v. *Sohmer*, 233 U. S. 434 (1914);
See *New Orleans* v. *Stempel*, 175 U. S. 309, 322 (1899).

A debt had been held to have a taxable situs also at the domicile of the debtor.

Blackstone v. *Miller*, 188 U. S. 189 (1903).

So, by 1914 a debt in the form of a bond or note had been held to be subject to taxation in three places: domicile of the creditor, domicile of the debtor, and place where the specialty was permanently kept.

Shares of stock fared no better. A taxable situs was found for them at the domicile of the owner, in the state of incorporation, and in the state of business situs.

Hawley v. *Malden*, 232 U. S. 1 (1914);
Frick v. *Pennsylvania*, 268 U. S. 473 (1925);
See *New Orleans* v. *Stempel*, *supra*.

The specific application of the business situs principle to shares of stock was made later in *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234 (1937). If the corporation were incorporated in more than one state, then more than three states presumably could tax the shares. *Northern Central Railway Co.* v. *Fidelity Trust Co.*, 152 Md. 94, 136 Atl. 66 (1927).

The realization by this Court of the injustice and oppression caused by this multiplicity of taxes gave rise to

an interpretation of the due process clause of the Fourteenth Amendment which sought to limit taxation to a single state unless a compelling reason should justify otherwise.[1]

As we have seen, the problem never arose in connection with land for it was always regarded as taxable only by the state where it was situated.

By 1905 this Court had definitely restricted the taxable situs of tangible personal property to one state. If it be permanently located[2] in a particular state, then it is subject to a property or transfer tax in that state alone.

Union Transit Co. v. *Kentucky*, 199 U. S. 194 (1905);
Frick v. *Pennsylvania*, 268 U. S. 473 (1925);
City Bank Farmer's Trust Co. v. *Schnader*, 293 U. S. 112 (1934);
Sancho v. *Humacao Shipping Corporation*, 108 F. 2d, 157 (C. C. A. First Cir. 1939), cert. denied, 310 U. S. 641 (1940).

If tangible personal property be not permanently located in any state, then it may be taxed at the domicile of the owner.

Southern Pacific Company v. *Kentucky*, 222 U. S. 63 (1911);
New York Central R.R. v. *Miller*, 202 U. S. 584 (1906);
See *Johnson Oil Co.* v. *Oklahoma*, 290 U. S. 158, 161 (1933).

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[1]This interpretation developed even though there are found in some of the opinions of this Court the statement that the Fourteenth Amendment does not forbid double taxation. See for example, the cases referred to on pages 15 and 16 of petitioner's brief.

[2]The presence in the state must have some permanence; it cannot be merely temporary. *Hays* v. *Pacific Mail S. S. Co.*, 17 How. (U. S.) 596 (1854); other cases collated in 28 Yale L. J. 525.

Thus it is only when tangible personal property acquires a taxable situs elsewhere that the state of the owner's domicile may not tax it. It seems clear, therefore, that underlying the decisions of this Court dealing with tangible property is the principle that under the due process clause tangibles and the transfer of tangibles may be taxed only in one state.

The time came in 1930 when the principle against double taxation was applied to four kinds of intangibles: bonds, notes, bank deposits and credits.

Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204 (1930);
Baldwin v. *Missouri*, 281 U. S. 586 (1930);
Beidler v. *South Carolina Tax Comm.*, 282 U. S. 1 (1930).

In *Farmers Loan & Trust Co.* v. *Minnesota, supra*, a New York decedent owned and kept in that state negotiable bonds and certificates of deposit issued by the State of Minnesota and certain cities in that state. Some were registered, others were payable to bearer. None had any connection with any business carried on in Minnesota. All passed under the decedent's will which was probated in New York, where his estate was administered and where a tax was paid upon the testamentary transfer.

Minnesota assessed an inheritance tax upon the same transfer. The executor claimed that such a tax conflicted with the Fourteenth Amendment.

This Court held that the bonds and certificates of deposit had acquired a permanent situs for taxation in New York and that their testamentary transfer was taxable there but not in Minnesota. In doing so, it said (pp. 209, 211-212):

> "But it is said the obligations were debts of Minnesota and her corporations, subject to her control; that her laws gave them validity, protected them

and provided means for enforcing payment. Accordingly, counsel argue that they had situs for taxation purposes in that State and maintain the validity of the challenged assessment."

* * * * *

"While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago *Union Refrig. Transit Co.* v. *Kentucky, supra,* declared—'* * * in view of the enormous increase of such property (tangible personality) since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a *situs* of its own for the purpose of taxation, and correlatively to exempt (it) at the domicile of the owner.' And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy

> an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

The present Chief Justice, who concurred in the result, felt that it was enough to uphold the decision that the transfer was effected in New York by one domiciled there. The privilege taxed, he pointed out, was not enjoyed in Minnesota and hence could not be taxed there. We shall advert to his concurring opinion when treating a different approach to our problem (Point III, *infra*).

In *Baldwin* v. *Missouri*, 281 U. S. 586, *supra*, the court held that cash deposited in Missouri banks, bonds and notes physically present in Missouri, some of which were secured by mortgages on Missouri land, were not subject to an inheritance tax in Missouri when their owner died a resident of Illinois.

In *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1, *supra*, this Court held that the transfer of an indebtedness owing to an Illinois decedent by a South Carolina corporation was not subject to taxation in South Carolina. It was pointed out that the transfer of the indebtedness had been properly taxed in Illinois, the domicile of the decedent and was not subject to a second tax at the domicile of the debtor. The decision was unanimous, Mr. Justice Holmes and Mr. Justice Brandeis acquiescing on the ground that the *Farmers Loan & Trust Company* and *Baldwin* cases sustained the result.

Thus was the stage set for *First National Bank* v. *Maine*, 284 U. S. 312, which came to this Court in 1931. In view of the unmistakable trend of the decisions, counsel for a decedent for the first time contended in this Court that the state of incorporation was without power to tax the transfer.

of shares of stock in a domestic corporation owned by a non-resident decedent. The contention was upheld. The principle against double taxation, the taxation of the same event in two States, was applied to shares of stock.

II

Before considering the decision in *First National Bank* v. *Maine*, let us pause to reflect upon the jurisdiction being exercised by this Court and the pattern of due process which the decisions already referred to were fashioning.

For some years many have felt that underlying all of the provisions of the Constitution and its Amendments is the fundamental concept that in the creation of the Union there was a delegation to the central government by the states and their peoples of sufficient power to enable it to deal effectively with problems national in scope. What those problems would be, only the developments of time and the onward march of progress would determine. During the past decade we have seen radical changes in the view as to what are properly to be regarded as national problems. Whether the delegated power would have to be exercised by the Congress, by the Executive or by the Supreme Court would be determined by the character of the problem.

The test of whether a problem is national in scope is whether or not it may be effectively dealt with by the states. If there is a substantial conflict of interest, if the various states compete for benefits to the detriment of other states and their peoples, then the national government must intercede for the protection of its citizens.

Each of the states upon joining the Union yielded some part of its sovereignty. So much of its taxing power and so much of all the rest of its power was surrendered as was necessary to permit the formation of a family of states.

The due process clause of the Fourteenth Amendment, we submit, gives expression to that self-abnegation.[3]

In that Amendment is found the delegation to the Federal Government of the power to require the states to keep within the bounds of decency and fairness. In it was the recognition that every citizen of the United States has something more than his rights flowing from citizenship of his own state. By virtue of being a citizen of the United States he gains the protection of his national government against oppression, and against arbitrary or unfair treatment by his own or any other state.

In the words of this Court in its opinion in *Burnet* v. *Brooks*, 288 U. S. 378, 401:

> "* * * Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the State to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction. * *"

If this doctrine is applied to the power to tax, it will be found that the states retain ample power to tax for the benefits they confer. As we have seen, it has long been recognized that a tax may be laid on land or on the transfer of land only at its situs. For any other state to tax would be oppressive. For less long, but for at least seventeen years, it has been recognized that a tax may be laid on tangible personal property or the transfer of it only at its situs. For any other state to tax would be an oppressive burden on its owner.

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[3]The time has passed when one may argue that the due process clause of the Fourteenth Amendment imposes no restriction on the taxing power of the states (see Petitioner's brief, pp. 18-19). *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, 80, 81 (1938) and cases cited.

It does not help explain the decisions to say that in the case of land or tangibles it is only in the state of their situs that they receive protection. Surely in the last analysis it is the owner of the property who is taxed—either because of his ownership or his exercise of the privilege of transfer.[4] So it might well be argued that in his enjoyment of his ownership, he derives benefits from not only the state of situs but also the state of his domicile. The state of situs gives police protection and other benefits, but the state of his domicile gives him an orderly society without which he could not enjoy the ownership of his property no matter where it might be located. So, unless we accept some other principle, we must permit the state of domicile to tax land and tangibles and the transfer of them though located elsewhere, as well as permit taxation at their situs. But this Court has definitely decided that the state of domicile may do no such thing.

The other principle is the one accepted as to land and tangibles and as to the four kinds of intangibles in the cases already referred to. That principle is the principle against double taxation.

In the application of that principle intangibles should be placed upon a parity with tangibles. Let them be taxable at the domicile of their owner and there alone unless they acquire a business situs elsewhere. If they acquire a business situs, then let the state of domicile yield to the state of business situs. That is the direction the decisions of this Court were taking when *First National Bank* v. *Maine* was decided. The decision in that case applied the principle to shares of stock and was, we submit, eminently sound.

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[4]This was observed by Mr. Justice Holmes, dissenting, in *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83, 97 (1929), when he said: "Taxes generally are imposed upon persons, for the general advantages of living within the jurisdiction, not upon property, although generally measured more or less by reference to the riches of the person taxed, on grounds not of fiction but of fact."

POINT III

The question presented in the case at bar has already been decided by this Court in First National Bank v. Maine.

I

The identical question presented here was decided by this Court in *First National Bank* v. *Maine*, 284 U. S. 312 (1932).

In that case an appeal was taken by the executors of an estate from a judgment of the Supreme Judicial Court of Maine sustaining a succession tax imposed by the State of Maine upon shares of stock in a Maine corporation owned by a non-resident decedent.

The decedent died testate, a resident of Massachusetts. The greater portion of his estate consisted of shares of stock in the Great Northern Paper Company, a Maine corporation, which had most of its assets in Maine. His will was probated in Massachusetts where an inheritance tax of $32,000 was assessed and paid upon the net estate. Ancillary administration was taken out in Maine and an inheritance tax of $62,000 was assessed there upon the transfer of the shares of the Great Northern Paper Company with a credit upon this amount for the tax paid in Massachusetts. Upon these agreed facts the State of Maine brought an action of debt which was referred for final decision to the Supreme Judicial Court, sitting as a law court.

Revised Statutes of Maine, c. 69, § 1, then in force, provided in part:

> "All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, * * * shall be subject to an inheritance tax for the use of the state as hereinafter provided * * *"

Section 25 of the same chapter in substance provided that as to transfers of stock in a Maine corporation owned by non-residents the tax should be paid at the time of the transfer.

The Maine court held that the shares of stock were "within its [the state's] jurisdiction and subject to an inheritance tax * * * regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in the taxing state", without thereby infringing the due process clause of the Fourteenth Amendment.

This Court reversed the decision of the Maine court and held the tax to be unconstitutional. In doing so it decided first, that only one state could, within the provisions of the due process clause of the Fourteenth Amendment, assess a tax upon the testamentary transfer of the shares of stock in question and second, that the state with the requisite jurisdiction to impose the tax was the state of the decedent's domicile.

After a review of its earlier decisions defining the jurisdiction of the states to tax testamentary transfers, this Court said (p. 326):

> "It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment."

The three cases referred to were *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586, and *Beidler* v. *South Carolina Tax Comm.*, 282 U. S. 1, which we have already discussed at pages 9 to 11 of this brief.

With that prelude the Court proceeded to hold that the rule of immunity from taxation by more than one state is broader than the applications thus far made of it and that shares of stock constitutionally can be subjected to a death transfer tax by only one state.

The basis given for the application to death taxes of the rule of immunity from taxation by more than one state was this (p. 327):

> "A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states."

The remaining question was: in which state does the taxable event occur? As to that this Court said (pp. 328-329):

> "* * * In the case of tangible personality, the solution is simple: the transfer, that is, the taxable event, occurs in that state where the property has an actual *situs*, and it is taxable there and not elsewhere. In the case of intangibles, the problem is not so readily solved, since intangibles ordinarily have no actual *situs*. But it must be solved unless gross discrimination between the two classes of property is to be sanctioned; and this court has solved it in respect of the intangibles heretofore dealt with by applying the maxim *mobilia sequuntur personam*. *Farmers Loan Co.* v. *Minnesota, supra*, at pp. 211-212; *Baldwin* v. *Missouri, supra; Beidler* v. *South Carolina Tax Comm., supra.*
>
> This ancient maxim had its origin when personal property consisted, in the main, of articles appertaining to the person of the owner, such as gold, silver, jewels and apparel, and, less immediately, animals and products of the farm and shop. Such property was usually under the direct supervision of the owner and was often carried about by him

on his journeys. Under these circumstances, the maxim furnished the natural and reasonable rule. In modern times, due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the rule has gradually yielded to the law of the place where the property is kept and used. *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Eidman* v. *Martinez*, 184 U. S. 578, 581; *Union Transit Co.* v. *Kentucky, supra*, 206. But in respect of intangible property, the rule is still convenient and useful, if not always necessary; and it has been adhered to as peculiarly applicable to the class of property. *Blodgett* v. *Silberman, supra*, 9-10; *Farmers Loan Co.* v. *Minnesota, supra*, 211; *Union Transit Co.* v. *Kentucky, supra*, 206.

The considerations which justify the application of the fiction embodied in the maxim to death transfer taxes imposed in respect of bonds, certificates of indebtedness, notes, credits and bank deposits, apply, with substantially the same force, in respect of corporate shares of stock. And since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax. * * *"[5]

Thus, at least as between the state of the decedent's domicile and the state of incorporation, it was held that the testamentary transfer of the shares is taxable by the state of the decedent's domicile.

Although the present Chief Justice concurred in the decisions of the *Farmers Loan & Trust Company, Baldwin* and *Beidler* cases, he wrote a dissenting opinion, in which Jus-

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[5]Although we would always prefer to avoid fictions, still we may hesitate to discard *mobilia personam sequuntur*, said to be a maxim as old as the law itself. *Monidah Trust* v. *Sheehan*, 45 Mont. 424, 123 Pac. 692 (1912). Shares of stock themselves are the creatures of a more recent fiction: a legal entity, the corporate fiction, now inextricably woven into our economic structure.

tices Holmes and Brandeis concurred, in *First National Bank* v. *Maine*. He felt that the earlier decisions did not require the decision announced by the majority. He also felt that the terms of the majority opinion were too broad in any event because their dictum "would sweep away all power to impose any form of tax with respect to the shares of a domestic corporation if owned by non-residents" (p. 333).

Of course in the case at bar the Respondents need only urge the validity of the decision in *First National Bank* v. *Maine*, not its dicta or implications. As to a tax on the testamentary transfer of the shares we do urge that the decision is sound.

It had been urged by counsel in that case, as it is now urged by counsel for the petitioner, that there was a real distinction between bonds and stock and that even though the state of domicile alone could tax the testamentary transfer of bonds, there should be no restriction on the right of the state of incorporation to tax the testamentary transfer of shares of stock (Petitioner's Brief, p. 26). The argument was rejected in these words (pp. 327-328):

> "A distinction between bonds and stocks for the essentially practical purposes of taxation is more fanciful than real. Certainly, for such purposes, the differences are not greater than the differences between tangible and intangible property, or between bonds and credits. When things so dissimilar as bonds and household furniture may not be subjected to contrary rules in respect of the number of states which may tax them, there is a manifest incongruity in declaring that bonds and stocks, possessing, for the most part, the same or like characteristics, may be subjected to contrary rules in that regard."

While, as petitioner has pointed out, dissimilarities do exist, so also do similarities.

Corporate bonds undoubtedly have some relationship to the jurisdiction of the state of incorporation. The corporate debtor issued the bond under powers derived from the state which gave it its Charter. The obligation is pro-

tected by its law. In case of insolvency the rights of the creditor would be determined by that law. In case of enforcement of the obligation the state of the debtor's domicile would give the best relief. If the bonds should be secured by a mortgage on land within the state, as it was in *Baldwin* v. *Missouri*, 281 U. S. 586, the creditor would resort to the law and the courts of that state to realize on his security in case of default.

Corporate stock also possesses some elements essentially local to the state of incorporation. That state breathed life into the corporate being; under its laws the stock was conceived and delivered. To enforce his rights in connection with the internal affairs of the corporation, the shareholder would resort to the laws of that state. To realize upon his share in the assets of the corporation on its dissolution, the shareholder would rely upon the laws and courts of that state just as the bondholder would come into the state to realize upon his interest in the mortgage security of his bond upon default.

But whatever relationship exists between a bond and a share of stock on the one hand and the state of the debtor's domicile or the state of incorporation on the other hand, there is no relationship at all between the testamentary transfer of either a bond or a share of stock and the state of the debtor's domicile or state of incorporation.

It is a tax on the testamentary transfer of the shares of stock and not a property tax on the shares themselves that concerns us. A state might well create and give protection to intangible property rights and yet have nothing to do with their transfer upon the death of the owner. That is precisely what happened in the case at bar and in *First National Bank* v. *Maine*.

In the case at bar Mr. Harkness died a resident of New York. Neither he nor his shares ever "resided" in Utah or was ever connected with any business in Utah. His will was probated in New York. There the succession took place. As a practical matter, too, the shares are transferable on the books of the company in New York. No transfer books have been maintained in Utah. Thus the

transfer, the thing sought to be taxed by Utah, was effected in New York by the death of one domiciled there and is controlled by its law.

Once created, the shares had acquired the incident of transferability on the death of the owner. That incident could not thereafter be impaired by Utah. Its transfer on the owner's death would take place wherever he was domiciled at the time of his death and would be effected by the law of that place, unaided by the law of Utah. This is conceded by the petitioner. On page 62 of its brief we find:

> "Respondents also may argue that the laws of the State of New York govern the devolution of and succession to the personal property in this case by reason of the fact that the decedent was a resident of New York. With that proposition we do not quarrel. We admit that the laws of the State of Utah can have no bearing upon the right to succession, the degrees of succession, or other determinative factors in connection with the probate of personal property belonging to this decedent's estate."

The present Chief Justice, writing in *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, upon the taxability by Minnesota of the transfer of bonds issued by that State but owned by a New York decedent, accurately described the situation likewise presented by a transfer of shares of stock, when he said (pp. 214-215):

> "* * * So far as the transfer, as distinguished from the contract itself, is concerned, it is New York law and not that of Minnesota which, by generally accepted rules, is applied there and receives recognition elsewhere. See *Bullen* v. *Wisconsin*, 240 U. S. 625, 631; *Russell* v. *Grigsby*, 168 Fed. 577; *Lee* v. *Abdy*, 17 Q. B. Div. 309; *Miller* v. *Campbell*, 140 N. Y. 457, 460; *Spencer* v. *Myers*, 150 N. Y. 269. Once the bonds had passed beyond the state and were acquired by an owner domiciled elsewhere, the law of Minnesota neither protected, nor could it withhold the power of transfer or prescribe its terms.
>
> In the light of these considerations, granting that the continued existence of the contract rested in part on the law of Minnesota, the relation of that

law to the transfer in New York, both in point of theory and in every practical aspect, appears to me to be too attenuated to constitute any reasonable basis for deeming the transfer to be within the taxing jurisdiction of Minnesota."

We therefore submit that there is no valid reason why shares of stock should not receive the same treatment as the other choses in actio. dealt with in the three earlier cases.

II

The decision in *First National Bank* v. *Maine* has been accepted as establishing the principle of constitutional law that the state of incorporation may not tax the testamentary transfer of shares of stock in domestic corporations owned by non-resident decedents.

Moses v. *Read*, 63 F. (2d) 16 (C. C. A. 3rd) (1933);
First Nat'l Bank of Boston v. *Comm. of Int. Rev.*, 63 F. (2d) 685 (C. C. A. 1st) (1933);
City Bank Farmers Trust Co. v. *Bowers*, 68 F. (2d) 909, 912 (C. C. A. 2nd) (1934);
Igleheart v. *Comm.*, 77 F. (2d) 704 (C. C. A. 5th) (1935);
Smith v. *Ajax Pipe Line Co.*, 87 F. (2d) 567 (C. C. A. 8th, dictum) (1937);
Nevin v. *Martin*, 22 F. Supp. 836 (D. C., N. J.) (1938);
City Bank Farmers Trust Co. v. *Schnader*, 8 F. Supp. 815, 817; (E. D., Pa.) (1934);
Zahn's Exc'r. v. *State Tax Comm.*, 243 Ky. 167, 47 S. W. (2d) 925 (1932);
Matter of Lagergren, 276 N. Y. 184, 11 N. E. (2d) 722 (1937);
Baker et al. v. *State*, 186 Minn. 160, 242 N. W. 697 (1932);
Kittredge v. *Boyd, State Treas. et al.*, 136 Kan. 691, 18 Pac. (2d) 563 (1933).

POINT IV

The authority of First National Bank *v.* Maine stands unimpaired by later decisions of this Court.

1. *First National Bank* v. *Maine* has been neither overruled nor disapproved in any subsequent decision of this Court. Until now the question presented in the case at bar has not been before this Court since *First National Bank* v. *Maine*.

2. That decision has been repeatedly referred to in the opinions of this Court in later cases as setting forth the law of the land as to the jurisdiction of the states to impose death taxes on shares of stock.

The case has been cited by this Court as an authority in the following cases:

Lawrence v. *State Tax Comm.*, 286 U. S. 276, 280 (1932);
Burnet v. *Brooks*, 288 U. S. 378, 400 (1933);
City Bank Farmers Trust Co. v. *Schnader*, 293 U. S. 112, 116 (1934);
Senior v. *Braden*, 295 U. S. 422, 432 (1935);
Wheeling Steel Corp. v. *Fox*, 298 U. S. 193, 209 (1936);
New York ex rel. Whitney v. *Graves*, 299 U. S. 366, 372 (1937);
New York ex rel. Cohn v. *Graves*, 300 U. S. 308, 315 (1937);
Worcester County Trust Co. v. *Riley*, 302 U. S. 292, 298 (1937);
Guaranty Trust Company v. *Virginia*, 305 U. S. 19, 22 (1938);
Curry v. *McCanless*, 307 U. S. 357, 363 (1939).

In *Burnet* v. *Brooks*, *supra*, while restating the distinction between the limitations of state jurisdiction to tax and the broad authority of the Federal Government, the Court

expressly approved the decision in *First National Bank* v. *Maine*, saying (pp. 400-401):

> "* * Respondents' reliance is upon the decisions of this Court with respect to the limitation of the taxing power of the States under the due process clause of the Fourteenth Amendment. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312. They insist that the like clause of the Fifth Amendment imposes a corresponding restriction upon the taxing power of the Federal Government.
>
> The argument is specious, but it ignores an established distinction. Due process requires that the *limits of jurisdiction* shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the States to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction. This is the principle which underlies the decisions cited by respondents. These decisions established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State and that jurisdiction to tax was restricted accordingly. In *Farmers Loan & Trust Co.* v. *Minnesota*, *supra*, the Court applied the principle to intangibles, and referring to the contrary view which had prevailed, said (p. 209): 'The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by resorting to reciprocal exemption laws.' It was this 'rule of immunity from taxation by more than one State,' deducible from the decisions in respect of various and distinct kinds of property, that the Court applied in *First National Bank* v. *Maine*, *supra*, p. 326."

In *City Bank Farmer's Trust Co.* v. *Schnader*, 293 U. S. 112, *supra*, this Court again unanimously affirmed the principal of the decision. It said (p. 116):

> "* * As the transfer cannot be subjected to taxes imposed by more than one state (*Frick* v. *Pennsylvania*, 268 U. S. 473, 488-492. *Safe Deposit & T. Co.* v. *Virginia*, 280 U. S. 83, 93. *Farmers Loan & T. Co.* v. *Minnesota*, 280 U. S. 204, 210. *First National Bank* v. *Maine*, 284 U. S. 312, 326-327), Appellant framed its complaint to call for a decision whether Pennsylvania or New York is entitled to the tax. * *"

In *Senior* v. *Braden*, 295 U. S. 422, *supra*, while distinguishing a case the Court said (p. 432):

> "The opinion accepted and follows the doctrine of *Blackstone* v. *Miller*, 188 U. S. 189, and *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54. Those cases were disapproved by *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204. They are not in harmony with *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83, and views now accepted here in respect of double taxation. See *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312."

In 1936 the decision was again approved in *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, *supra*, in these words (p. 209):

> "* * When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the owner's domicile for purposes of taxation. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 211. And having thus determined 'that in general intangibles may be properly taxed at the domicile of their owner,'

we have found 'no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles.' Id., p. 212. The principle thus announced in *Farmers Loan & Trust Co.* v. *Minnesota* has had progressive application. *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312, 328, 329. * *"

In *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366, *supra*, an income tax at the business situs was upheld under the recognized exception to the rule of taxation of intangibles at the owner's domicile. Citing *First National Bank* v. *Maine* with approval, this Court said (pp. 371-374):

"The relator's argument is that the membership in the Exchange is intangible personal property, that as a general rule property of that sort is taxable only at the domicile of the owner, and that unless the membership has a 'business situs' in New York it is not taxable there. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 213; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1, 8; *First National Bank* v. *Maine*, 284 U. S. 312, 329, 331; *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, 209-211. He contends that the membership cannot be said to have a business situs in New York because he and his copartners reside and transact all their business in Massachusetts."

* * * * *

"We think that the dominant attribute of relator's membership in the New York Stock Exchange so links it to the situs of the Exchange as to localize it at that place and hence to bring it within the taxing power of New York. Accordingly we hold that in laying the tax upon the profits derived by the relator from the sale of the right appurtenant to his membership the State did not exceed the bounds of its jurisdiction. * *"

Upholding a New York Tax on rents received by a resident from land situated in another state, this Court in

New York ex rel. Cohn v. *Graves*, 300 U. S. 308, *supra*, pointed out that such a tax did not fall within the principle against double taxation. It said (pp. 314-315):

> "It would be pressing the protection which the due process clause throws around the taxpayer too far to say that because a state is prohibited from taxing land which it neither protects nor controls, it is likewise prohibited from taxing the receipt and command of income from the land by its resident, who is subject to its control and enjoys the benefits of its laws. The imposition of these different taxes, by the same or different states, upon these distinct and separable taxable interests, is not subject to the objection of double taxation, which has been successfully urged in those cases where two or more states have laid the same tax upon the same property interest in intangibles or upon its transfer at death. *Safe Deposit & Trust Co.* v. *Virginia, supra; Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312. These considerations lead to the conclusion that income derived from real estate may be taxed to the recipient at the place of his domicil, irrespective of the location of the land, and that the state court rightly upheld the tax."

In *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, *supra*, it was said (p. 298):

> "* * This Court has held that state statutes, construed to impose death taxes upon the intangibles of decedents domiciled elsewhere, infringe the Fourteenth Amendment, and it has accordingly reversed judgments of state courts enforcing such liability. *First National Bank* v. *Maine, supra; Farmers Loan & Trust Co.* v. *Minnesota, supra.* * *"

In *Guaranty Trust Co.* v. *Virginia*, 305 U. S. 19, *supra*, this Court upheld a Virginia tax on income received by a resident from a trust established and administered in New York where also the income was taxed. *First National Bank*

v. *Maine* was referred to with approval but held not to be inimical to the challenged tax. This Court said (pp. 22-23):

> "The insistence is that the challenged assessment was upon the identical income already rightly taxed by New York; that, under numerous decisions by us, two or more states may not tax the same subject; this would amount to double taxation and infringe the Due Process clause. To support this proposition the cases noted in the margin are cited [including *First National Bank* v. *Maine*].
>
> Those cases go upon the theory that the taxing power of a state is restricted to her confines and may not be exercised in respect of subjects beyond them. Here, the thing taxed was receipt of income within Virginia by a citizen residing there. The mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done within her borders. After much discussion the applicable doctrine was expounded and applied in *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, and *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308. The attempt to draw a controlling distinction between them and the present cause, we think, has not been successful."

In *Curry* v. *McCanless*, 307 U. S. 357, *supra*, and *Graves* v. *Elliott*, 307 U. S. 383 (1939), the majority of this court in two five-to-four decisions held that an inheritance tax might be imposed on intangibles by a state in which a decedent had placed them in a trust, as well as by the state of the decedent's domicile. Thus it was decided that not every case would permit the application of the single tax rule.

The present Chief Justice, writing for the majority, said (pp. 367, 373):

> "In cases where the owner of intangibles confines his activity to the place of his domicile it has been found convenient to substitute a rule for a reason, cf. *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 313; *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234, 241, by saying that his intangibles are taxed at

their situs and not elsewhere, or, perhaps less artificially, by invoking the maxim *mobilia sequuntur personam, Blodgett* v. *Silberman, supra; Baldwin* v. *Missouri, supra,* which means only that it is the identity or association of intangibles with the person of their owner at his domicile which gives jurisdiction to tax. But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax. * *"

* * * * *

"* * We have recently declined to press to a logical extreme the doctrine that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single state by attributing to them a situs within that state. We think it cannot be pressed so far here."

The minority of the court disagreed and held that the rule of single taxation should be applied and that the state of domicile must yield to the state of business situs.

However, the majority of the court in *Curry* v. *McCanless,* referred specifically to the authority of *First National Bank* v. *Maine* and, while declining to apply the single tax rule to the circumstances of the case before the court, reaffirmed the application of the rule made to the facts presented in *First National Bank* v. *Maine,* in *Farmers Loan & Trust Co.* v. *Minnesota, supra,* and in *Baldwin* v. *Missouri, supra.* It was said (p. 363):

"The doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state has received support to the limited extent that it was applied in *Farmers Loan & Trust Co.* v. *Minnesota,*

280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *First National Bank* v. *Maine*, 284 U. S. 312. Still more recently this Court has declined to give it completely logical application. It has never been pressed to the extreme now urged upon us, and we think that neither reason nor authority requires its acceptance in the circumstances of the present case."

3. Petitioner relies upon five recent decisions of this Court. Because of them, it is argued, *First National Bank* v. *Maine* is no longer law (Pet. brief, p. 46). They are: *Curry* v. *McCanless*, 307 U. S. 357 (1939); *Graves* v. *Elliott*, 307 U. S. 383 (1939); *Newark Fire Insurance Co.* v. *State Board of Tax Appeals*, 307 U. S. 313 (1939); *Wisconsin* v. *J. C. Penney Company*, 311 U. S. 435 (1940); *Stewart* v. *Pennsylvania*, 312 U. S. 649 (1941).

Each of these cases is plainly distinguishable from *First National Bank* v. *Maine* and the case at bar. Neither the facts nor the decisions in any of them have any relevancy to the case at bar.*

In *Curry* v. *McCanless*, *supra*, the decedent, a resident of Tennessee, transferred certain stocks and bonds to an Alabama Trust Company upon an *inter vivos* trust. The trustee took possession of the securities in Alabama and administered the trust in that state. The decedent reserved the income to herself for life, the power to change trustees, the power to direct sales and investments and the power to dispose of the trust principal by will. She disposed of the property by her will upon trusts different from those in the trust deed. She appointed separate executors for her Alabama and Tennessee property and the will was probated in both states.

In a five to four decision this Court held that the testamentary transfer of the principal of the trust was taxable in both states.

The majority felt that the decedent in that case had voluntarily subjected her intangibles to the protection of two

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*The language in the opinions and the principles enunciated in these cases will be considered in our next point.

states and should therefore give a *quid pro quo* for the benefits and protection received from each of them. Because of this decedent's activities in connection with her property, it was thought that the rule of single taxation should not be applied to such a case. Chief Justice Stone, writing for the majority, said (p. 367):

> "* * * But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains * * *."

In *First National Bank* v. *Maine* the decedent had engaged in no activity outside his domicile. Nor did the decedent in the case at bar. Mr. Harkness never was engaged in business in Utah; his shares of Union Pacific Railroad Company stock were never used in connection with any business in Utah but were kept by him in New York, the state of his domicile (R. 3). The decision in *Curry* v. *McCanless* just has no applicability whatever to the situation presented in *First National Bank* v. *Maine* and in the case at bar.[7]

At the same term of this Court *Graves* v. *Elliott, supra,* was decided with the same division of the Justices. That also was a trust case, the facts being substantially the same as in *Curry* v. *McCanless,* and the majority and minority opinions followed the same reasoning as in the companion case.

Newark Fire Insurance Co. v. *State Board, supra,* involved the right of the State of New Jersey to tax the capital stock and surplus of a domestic corporation which

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[7]The minority in *Curry* v. *McCanless* held that the rule of single taxation should be applied and that Alabama alone could tax the transfer because the intangibles had acquired a situs in that state akin to a business situs.

had its main office and transacted its business in New York. The tax was upheld in an eight to one decision, but two opinions were written in each of which four justices concurred.

Mr. Justice Reed, with whom Chief Justice Hughes, Mr. Justice Roberts and Mr. Justice Butler concurred, held that under the maxim *mobilia personam sequuntur* the presumption is that the taxable situs of a corporation's intangibles is the state of the corporation's origin unless a business or commercial situs is acquired elsewhere. Whether the domicile and the state of business situs both could tax, it was not necessary to decide since on the facts in the case before the court, he found that the Insurance Company had not acquired a business situs in New York. Hence, he concluded, "The presumption of a taxable situs solely in New Jersey is not overturned" (p. 322).

Mr. Justice Frankfurter, with whom the present Chief Justice, Mr. Justice Black and Mr. Justice Douglass concurred, held that *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325 (1920), and the cases which had followed it afforded a wholly adequate basis for the challenged tax.[8]

So the *Newark Fire Insurance Co.* case did not involve a transfer tax at all and certainly bears no relation to the problem in the case at bar.

Wisconsin v. *J. C. Penney Co.*, *supra*, presented what the majority of this Court considered to be a supplemental income tax laid by Wisconsin on income earned in that state by foreign corporations and what the minority considered a privilege tax laid on dividends declared and paid in another state. The majority's concept of the nature of the tax spelled validity; the minority's spelled invalidity. The division of the Court was five to four.

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[8]In that case this Court had upheld a North Dakota tax on domestic corporations measured by the value of their tangible property in North Dakota plus the value of their capital stock after deducting the value of their tangibles located outside of North Dakota.

If the tax there questioned was truly an income tax, no one would doubt its validity. *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366 (1937). But so considered, neither the tax nor the decision has any bearing on the case at bar.

If the tax should rather be considered an attempt by Wisconsin to lay a tax on a privilege exercised outside its borders, then we submit the minority correctly branded it as invalid under the Fourteenth Amendment.

In the case at bar there is no room for any difference of opinion as to the nature of the tax. We are concerned with a tax on a transfer which took place outside of the State imposing the tax. The reasoning of the minority in dealing with such a tax has its significance for the case at bar (pp. 446-447):

> "I assume that the principle still holds good that a state, a member of the sisterhood of states in the Republic, cannot extend her sovereignty by legislation so as to prohibit, to regulate, or to tax property or transactions of citizens of other sovereign states lying outside her boundaries and regulated by the law of the state of domicile or residence. * * * Those activities which have a real and substantial relation to the business transacted by the citizen of another state within her confines are, of course, subject to regulation and to taxation. It would be mere affectation to cite the adjudications of this court which are founded upon these propositions. I have thought that these principles were of the very warp and woof of the constitutional system which binds the states together in a federal union. Attempted transgressions of these limits of state sovereignty have time and again run afoul of the Fourteenth Amendment."

Stewart v. *Pennsylvania*, 312 U. S. 649, was another trust case in which this Court upon the authority of the *Curry* and *Graves* cases upheld a tax by the state of domicile upon an equitable interest in a trust administered in another state. No opinion was written.

POINT V

No principles have been enunciated by this Court which cast any doubt on the soundness of the decision in First National Bank *v.* Maine.

As already indicated, during the past ten years some members of this Court have differed in the extent to which the Court should go in the application of the principle of single taxation. Feeling that the emphasis should rather be on the benefit or protection given by a state to the thing taxed, they have preferred that approach to the problem of the state's jurisdiction to tax even though in some instances it would result in double taxation.

The recognition that the basis of all taxation is the benefit conferred by the taxing power is of course not new. That concept finds expression in early decisions of this Court. See, *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 202 (1905). It is important, however, to keep in mind that the benefit justifying the tax must be a benefit conferred directly in connection with the thing taxed. For example, a franchise granted to a foreign corporation permitting the transaction of business within a state would not justify that state taxing business done by the corporation elsewhere. Its taxing power would be limited to the business done within the state.

That principle, that approach to the constitutional problem of the state's jurisdiction to tax, in no degree casts any doubt upon the soundness of the decision in *First National Bank* v. *Maine*. Nor is there anything in the opinions rendered by any members of this Court since that decision which would indicate that on any theory the state of incorporation has the constitutional power to tax a testamentary transfer of shares of stock owned by a nonresident decedent.

In the discussion to follow we shall ignore the question of double taxation and the interpretation of the Fourteenth

Amendment which places upon this Court the duty of preventing an oppressive and unfair exercise of the taxing power by the states. We shall weigh the merits of the decision, as distinguished from the grounds of the decision, in *First National Bank* v. *Maine* and shall consider the constitutional power of the state of incorporation to tax the testamentary transfer of shares of stock owned by a non-resident decedent solely in the light of the test prescribed in the opinions which the petitioner in the case at bar asserts have "denounced and reversed" the *First National Bank* decision (Petitioner's Brief, pp. 46-61). Petitioner has cited five cases: *Curry* v. *McCanless*, 307 U. S. 357 (1939); *Graves* v. *Elliott*, 307 U. S. 383 (1939); *Newark Fire Insurance Co.* v. *State Board of Tax Appeals*, 307 U. S. 313 (1939); *Wisconsin* v. *J. C. Penney Company*, 311 U. S. 435 (1940); *Stewart* v. *Pennsylvania*, 312 U. S. 649 (1941) (no opinion).[9]

The principles relied upon by the petitioner were given expression in the majority opinions in *Curry* v. *McCanless, supra*, and *Wisconsin* v. *J. C. Penney Company, supra*. Although each of those cases is plainly distinguishable on its facts and in its decision from the case at bar, we shall examine and apply to the case at bar the test laid down in them.

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[9]It should be pointed out that the petitioner's entire argument based upon these decisions is unsound. The argument is this: the majority in these cases declined to accept the principle that the Fourteenth Amendment permits taxation of the transfer of intangibles by only one state; that principle was given by the court in *First National Bank* v. *Maine* as the basis of its decision; hence that decision has been overruled by implication. (See petitioner's brief, p. 56). A decision is not overruled by a refusal by the court to apply its reasoning in a later case unless the decision cannot be upheld on any reasoning. While in the cases relied on by the petitioner five members of this Court were unwilling to apply the principles enunciated in *First National Bank* v. *Maine*, the principles they did apply fully sustain the decision (as distinguished from the ground of the decision) in that case and hence fully sustain the judgment now under review. This will be demonstrated in this Point of our brief.

In the majority opinion in *Curry* v. *McCanless* it was said (pp. 367-370):

> "* * * Whether we regard the right of a state to tax as founded on power over the object taxed, as declared by Chief Justice Marshall in *McCulloch* v. *Maryland, supra,* through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both, * * *"
>
> * * * * * *
>
> "If taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws, * * *"

In the majority opinion in the later case, *Wisconsin* v. *J. C. Penney Co.*, it was said (p. 444):

> "* * * We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extra-territoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." * * *"[10]

Did the taxing power asserted by the State of Maine in *First National Bank* v. *Maine* and by the State of Utah

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[10]Power or control over the object taxed is thus apparently discarded as a basis of taxing power—and rightly so unless we wish to sanction the doctrine that might makes right, a concept abhorrent to the American system.

in the case at bar bear fiscal relation to protection, opportunities and benefits given by the state? We assert most emphatically that it did not.

As the present Chief Justice has said, "the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects."[11]

The taxing power asserted was not a power to tax shares of stock, as we have seen (Point III, *supra*). It was therefore not the power involved in *Corry* v. *Baltimore*, 196 U. S. 466 and *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506. The states of Maine and Utah asserted the power to tax the testamentary transfer of shares of stock. Their tax was not a property tax at all, but a tax upon a privilege, the privilege of disposition of the shares at death.[12]

The privilege of transferring these shares at death, was granted the decedent by the state of his domicile. As the majority said in *Curry* v. *McCanless*, page 369, "she also provided that by resort to her power to dispose of property by will, conferred upon her by the law of the domicile, the trust could be terminated and the property pass under the will." The transfer of the shares is consequently taxable by the state of domicile. That state bestows a benefit, confers an opportunity.

But what of the state of incorporation, the other state which asserts a power to tax?

As we have seen, in *Curry* v. *McCanless* the second state to claim a tax was the domicile of the trustee who held legal

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[11] *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, 80 (1938). Mr. Justice Roberts, dissenting, in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 447 (1940) expressed the same view: "in testing the constitutionality of an exaction this court examines for itself the nature and incidence of the tax * * *." By incidence we mean the direction of the fall of the tax; toward what it is aimed.

[12] Petitioner in its discussion of the protection and benefits given by the State of Utah persistently refers to the shares of stock as the object of the tax rather than the testamentary transfer of the shares. Its entire argument on pages 12 to 14 of its brief is therefore wholly beside the point.

title. Resort had to be made to that state to perfect the testamentary transfer. "In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both" (p. 372).

In neither *First National Bank* v. *Maine* nor in the case at bar did the decedent extend "his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state", to borrow again the words of the majority in *Curry* v. *McCanless* (p. 367). Certainly in the case at bar, if not in *First National Bank* v. *Maine*,[13] there was no need to invoke the law of the state of incorporation in connection with the transfer.

The decedent in the case at bar resided in New York and died there. His will was probated in New York and there alone. He was never engaged in business in Utah, his certificates of stock in Union Pacific Railroad Company were never within the State of Utah (R. 2, 3). Completion of the transfer by registration on the books of the Railroad Company could be achieved in New York and only in New York because there were no transfer facilities elsewhere.[14]

The testamentary transfer in this case neither in its legal nor its practical aspects bore any relation whatever

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[13] In *First National Bank* v. *Maine*, the dissenting justices pointed out that to complete the transfer in that case the shareholder had to resort to the law of the state of incorporation (p. 333). Apparently the only transfer office of the corporation was in that state. The divergence on this point between the *First National Bank* case and the case at bar will be discussed in our next Point.

[14] Even the Union Pacific Railroad Company has little association with the State of Utah. Incorporated there, yes, but for aught appears selection of any of the other states would have done as well. Its executive offices are located in New York and its board of directors meets there. Only a very small portion of its property is in Utah; less than ten per cent. of its revenue is derived from Utah and less than nine per cent. of its trackage is in that State (R. 2).

to the State of Utah. There was no relationship, fiscal or otherwise, between the asserted taxing power and the testamentary transfer of Mr. Harkness' shares. The state of Utah gave no opportunity, no protection and no benefit in connection with the transfer. In a word, it gave nothing for which it could ask a return.[15]

An analogous situation was presented in *Connecticut General Co.* v. *Johnson*, 303 U. S. 77 (1938). In that case

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[15]On pages 62 and 63 of the petitioner's brief we read: "The laws of the United States of America also have nothing to do with and can have no effect upon the devolution of or succession to property, or the probate of the estate of this decedent. Yet the jurisdiction and power of the Federal Government to levy an estate or transfer tax * * * has never been doubted since the decision in *Knowlton* v. *Moore*, (1900) 178 U. S. 41." So, even though the State of Utah contributes nothing to the testamentary transfer, still it should be permitted to tax it, petitioner implies.

In *Burnet* v. *Brooks*, 288 U. S. 378 (1933) the Respondents argued that since as between the States the transfer of intangibles could only be taxed at the state of domicile because of the Fourteenth Amendment, the intangibles of non-resident aliens could only be taxed at their national domicile and not by our Federal Government because of the Fifth Amendment. Now petitioner offers the converse.

This Court disposed of such a line of reasoning with the words, "The argument is specious, but it ignores an established distinction" (p. 401). The distinction referred to is that there are entirely different principles applicable to the taxing power of the Federal Government from those applicable to the States. The Federal Government may tax all persons and property within its control and necessarily its taxing powers parallel the taxing powers of the States. Otherwise, as this Court pointed out in the *Knowlton* case, the Federal Government would be excluded "from almost every subject of direct and many acknowledged objects of indirect taxation" (p. 59). The Court continued, "Under our constitutional system both the National and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established" (p. 60).

It is therefore of no assistance in the solution of the problems of a state's taxing power, to consider the taxing power of the Federal Government.

this Court was confronted by an attempt by the State of California to levy a privilege tax upon contracts of reinsurance made and performed by a foreign corporation in another state. The tax was held to infringe the due process clause of the Fourteenth Amendment.

The Treasurer of California had argued that since the corporation had been licensed to do business in that state and the risks reinsured against were based on policies of other companies issued in California to residents there, the making of the reinsurance contracts constituted a doing of business in that state. The argument was rejected. The present Chief Justice writing for the Court, with but one Justice dissenting, said (pp. 81-82):

> "* * Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection."
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> * * *
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> "* * All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."

So, the testamentary transfer of Mr. Harkness' shares of Union Pacific stock was not dependent upon any privilege or authority granted by the State of Utah and consequently the tax asserted in the case at bar cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state of Utah.

POINT VI

The Uniform Stock Transfer Act and the trend of modern decisions apart from that Act adopting the mercantile concept of shares of stock are additional reasons for applying the decision in *First National Bank* v. *Maine* to the case at bar.

We wish to urge the significance of two important elements present in the case at bar, but absent from *First National Bank* v. *Maine*. These features remove the sole basis found by the minority of this Court in *First National Bank* v. *Maine* for supporting the tax in that case.

On page 333 of his opinion in the *First National Bank* case the present Chief Justice said:

> "But, as the stockholder could secure complete protection and effect a complete transfer of his interest only by invoking the laws of both states, I am aware of no principle of constitutional interpretation which would enable us to say that taxation by both states, reaching the same economic interest with respect to which he has sought and secured the benefits of the laws of both, is so arbitrary or oppressive as to merit condemnation as a denial of due process of law."

There the minority of the Court felt that the stockholder could not secure complete protection and effect a complete transfer of his interest without resort to the law of the state of incorporation. But in that case, the state of incorporation had not enacted the Uniform Stock Transfer Act and the transfer office of the corporation in question was located in the state of incorporation. On the contrary, in the case at bar: the State of Utah has adopted the Uniform

Act[16] and the sole transfer office of the Union Pacific Railroad Company was located outside the state of incorporation (R. 2). Consequently, the stockholder in the case at bar had no need to invoke the law of Utah to secure complete protection or to effect a complete transfer of his interest.

Let us see the effect which the courts have given to the enactment of the Uniform Stock Transfer Act and the significance attributed to the location of the transfer office of a corporation.

The Uniform Stock Transfer Act was designed primarily to enact into law the Mercantile theory of shares and certificates of stock. In the words of the National Conference of Commissioners on Uniform State Laws the object of the act was

> "* * * that the certificate may, to the fullest extent possible, be the representative of the shares. This is the fundamental purpose of the whole act, and is in accordance with the mercantile usage." (Commissioners' note, 6 Uniform Laws Annotated at page 2.)

Accordingly, in the Uniform Stock Transfer Act set forth in the Revised Statutes of Utah, 1933, the following provisions, among others, are to be found:

Section 18-3-1 makes the transfer of the certificate operate as a transfer of the shares. It provides:

> "SECTION 18-3-1. *Exclusive Manner of Transfer.*
>
> Title to a certificate and to the shares represented thereby can be transferred only:

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[16]The Uniform Stock Transfer Act has now been adopted in 31 States. The State of Utah adopted the Act in 1927 (See Revised Statutes of Utah, 1933, Sections 18-3-1 to 18-3-21). The State of New York had adopted the Act previously (Personal Property Law, Sections 162-185).

The State of Maine is one of the few States which has never adopted the Uniform Stock Transfer Act. Hence its operation and effect played no part in the decision in *First National Bank* v. *Maine*.

(1) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby; or

(2) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent."

Section 18-3-5 grants full negotiability to the certificates of stock.

Section 18-3-13 provides that no attachment or levy upon the shares shall be valid unless the certificates be actually seized by the officer making the attachment or levy, or they be surrendered to the corporation which issued them or their transfer by the holder be enjoined.

Section 18-3-15 is also in pursuance of the general policy of the act and provides that there shall be no lien in favor of the corporation upon the shares and no corporate restrictions upon the transfer of the shares, unless the lien or restriction is stated on the certificate.

Although in most of the states which have enacted it, the Act is relatively new, there is a growing body of authority to the effect that the Uniform Stock Transfer Act operates broadly to merge the shares into the certificates in situations involving the ownership and transfer of the shares.

Thus it is established that in states which have adopted the Act shares of stock no longer have their situs at the

corporate domicile for purposes of attachment and levy. The share interest may only be attached through the attachment of the certificate itself unless the certificate has been surrendered to the corporation or its transfer by the holder has been enjoined.

Revised Statutes of Utah, 1933, Section 18-3-13;
American Surety Co. v. *Kasco Mills, Inc.*, 262 N. Y. 585, 188 N. E. 75 (1933);
Elgart v. *Mintz*, 123 N. J. Eq. 404, 197 Atl. 747 (1938);
Mills v. *Jacobs*, 333 Pa. 231, 4 Atl. (2d) 152 (1939);
Bloch-Daneman Co. v. *J. Mandelker & Sons*, 205 Wisc. 641, 238 N. W. 831 (1931).

Likewise it has been held under the Act that for purposes of *in rem* proceedings shares of stock no longer constitute property at the corporate domicile, where the certificates are owned and held outside of the state of incorporation.

Montfort v. *Korte*, 100 F. (2d) 615 (C. C. A. 7th) (1938);
Klein v. *Wilson & Co.*, 7 F. (2d) 769, aff'd., 7 F. (2d) 777 (C. C. A. 3rd) (1925);
Iron City Savings Bank v. *Isaacsen*, 158 Va. 609, 164 S. E. 520 (1932);
Elgart v. *Mintz, supra.*

In the *Montfort* case the Circuit Court of Appeals for the Seventh Circuit held that the District Court in Indiana did not have jurisdiction *in rem* over shares of stock in an Indiana Corporation, the certificates for which were outside of the State. After reciting the old doctrine that the shares of stock have their situs in the State of incorporation the Circuit Court stated (pp. 616, 617):

> "It becomes apparent, however, that a distinction has generally been made in states where a Uniform Stock Transfer Act is in effect. Such an act exists in Indiana. * * *

"* * * the situs of pledged securities, including stock in a corporation, is in the jurisdiction where such security or stock is owned or possessed. Applying such pronouncement to the instant case, it is apparent that the situs or res of the stock in controversy is in Kentucky rather than Indiana, and that plaintiff's theory that its action is maintainable as one in rem, must fail. * * *"

The Court in its opinion approved the following language in 39 Harvard Law Review at page 485:

"An apparent exception to the rule that shares of stock have a situs at the domicile of the corporation is found where the Uniform Stock Transfer Act is in force. This enactment merges the share in the certificate so that the state dealing with the certificate has power to affect the shares independently of the state of the corporate domicile."

This same principle was applied in *Klein* vs. *Wilson & Co., supra,* where the United States District Court for New Jersey vacated an order appointing an ancillary receiver for a New York corporation which in turn held stock in the New Jersey subsidiary. In holding that the shares of stock in the New Jersey corporation did not constitute property within the State of New Jersey, the District Court stated at page 771:

"* * * the situation created as above is governed by the provisions of the Uniform Transfer Act of New Jersey (Chapter 191, Laws of 1916) which regulates the passage of title of stock certificates. * * * Under these provisions I conceive the stock certificates to be more than mere evidence of interest in property, and to be the concrete physical representation of such interest, possessed of such characteristics and qualities as necessitates an actual delivery thereof in order to transfer title to the certificates themselves and the shares represented by them. This being the case, they are properly within the jurisdiction of, * * * the domiciliary receivers [of the parent corporation in New York] and quite beyond any claim which might be asserted by a receiver appointed under any New Jersey authority, state or federal."

No case has been found in which the Uniform Stock Transfer Act has been applied in determining the choice of place of administration of decedents' estates. But in his work, *The Conflict of Laws*, Professor Beale states (Sec. 477.2, p. 1502):

> "It is submitted that the Uniform Stock Transfer Act should be construed as adopting the Mercantile view whole-heartedly including the treatment of certificates as controlling the shares for purposes of administration. There is however real doubt how far a court, which has prior to Act held the situs for administration to be at the domicile of the corporation, will hold that the Uniform Act has introduced a new rule in this particular."[17]

Finally, we find that the Act has also been applied to inheritance taxes. In *Newell* v. *Tremont Lumber Co.*, 161 La. 649, 109 So. 344 (1926), the Supreme Court of Louisiana held that under the Uniform Stock Transfer Act the shares of stock in a domestic corporation were no longer to be considered property physically located within that state for Inheritance Tax purposes. The court stated at page 652:

> "* * * under the provisions of that statute [referring to the Uniform Stock Transfer Law] no title to shares of stock in a corporation can be acquired or held by anyone, in any way, adversely to the bona fide holder of the certificate of stock duly indorsed. See sections 1, 8, 10 and 13. The transferable value of the stock lies, therefore, wholly in the certificates; and thus the certificates are by law made the corporeal or physical representatives of the stock itself, so that,

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[17] In *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394 (1917) cited at page 36 in petitioner's brief, this Court held that the state of incorporation has jurisdiction for the purpose of founding administration (as well as taxing the succession) of shares of stock. But the decision was placed squarely on the control then enjoyed by the state of incorporation over the transfer of the shares of stock (p. 401). Under the Uniform Stock Transfer Act that control passes out of its hands.

where said certificates are, there also, the stock itself is physically located."[18]

Not only have there been these decisions resting upon the Uniform Stock Transfer Act, but even without reliance upon that Act there has been an increasing acceptance by the judiciary of the Mercantile view of merger of the share in the certificate.

Certificates of stock in a foreign corporation have been held subject to attachment in the jurisdiction in which they have been physically situated, *Simpson* v. *Jersey City Contracting Company*, 165 N. Y. 193, 58 N. E. 896 (1900); *People ex rel Wynn* v. *Grifenhagen*, 167 App. Div. (N. Y.) 572, 152 N. Y. S. 679 (1915); *Puget Sound National Bank* v. *Mather*, 60 Minn. 362, 62 N. W. 396 (1895); see *Mitchell* v. *Leland Co.*, 246 Fed. 163 (C. C. A. 9th) (1917). The principle of those decisions was recognized by this Court in *Yazoo & M. V. R. R. Co.* v. *Clarksdale*, 257 U. S. 10, 22 (1921). Such certificates have also been held to constitute a *res* over which the local court may have jurisdiction *in rem*, *Vidal* v. *South American Securities Co.*, 276 Fed. 855 (C. C. A. Second Cir. 1922). The courts of the corporate domicile have on occasion declined to administer the shares of the stock of a non-resident decedent in a domestic corporation, *Lohman* v. *Kansas City Southern Railway Co.*, 326 Missouri 819, 33 S. W. (2d) 112 (1930).

Furthermore, in other fields unrelated to attachments, proceedings *in rem* or administration of estates, the Mercantile view has gained headway. (1) For the purpose of interpreting a testamentary division of property, it has been the Mercantile view that has been utilized. In *In re Clark*, L. R. (1 Chancery, 1904) 294, it was held that shares of stock in a South African corporation constituted "property in England" the physical location of the certificates. (2) The theft of unindorsed stock certificates has been held to be a theft of the "shares themselves", entitling the

[18]Thus clearly is the basis of the decision set forth notwithstanding the perplexity expressed on page 28 of petitioner's brief.

plaintiff to recover the market value of the shares and not simply the nominal damages which would result from a theft of a mere muniment of title. *Pierpoint* v. *Hoyt*, 260 N. Y. 26, 182 N. E. 235 (1932); see also *McAllister* v. *Kuhn*, 96 U. S. 87, 89 (1877), and *Ayres* v. *French*, 41 Conn. 142, 151 (1874). (3) In New York it has been held that the adoption of the Sales Act governing goods and chattels changed the law with respect to the sale of stock because the certificate embodying the share must be treated as a chattel. *Agar* v. *Orda*, 264 N. Y. 248, 190 N. E. 479 (1934). (4) In *Direction Der Disconto-Gesellschaft* v. *U. S. Steel Corp.*, 267 U. S. 22 (1925) this Court held that a transfer of title to a certificate of stock in a New Jersey corporation valid under the law of England where the transfer occurred effectively transferred title to the share itself.

At the close of its brief the petitioner has tucked in an argument based upon the petitioner's conception of the New York stamp tax on transfers of stock (pp. 61-62). The pertinent sections of the New York statutes are set forth in the footnote.[19] Of that tax petitioner says (1) "by the

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[19]For many years prior to 1933 Sections 270 and 270-a of the New York Tax Law imposed a tax

> " • • • on all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock, or certificates of rights to stock, or certificates of deposit representing certificates taxable under this article in any domestic or foreign association, company or corporation, or certificates of interest in business conducted by a trustee or trustees, made after the first day of June, nineteen hundred five, whether made upon or shown by the books of the association, company, corporation or trustee, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of sale or transfer, whether intermediate or final • • • "

and exempted from the tax such shares and certificates

> " • • • in any domestic association, company or corporation, even though a record of the transfer is made in the stock book kept in compliance with section ten of the stock corporation law, if neither the sale, nor the agreement to sell,

terms thereof, every transfer of stock in a New York corporation is subjected to a transfer tax''; and (2) ''this type of tax has been sustained so far as its constitutionality is concerned''. Neither of those statements is correct.

(1) Prior to 1933 New York taxed none of the transfers of stock in New York corporations unless some part of the transaction constituting the transfer occurred within the state. The statute expressly provided that recording the transfer in the stock book of the company did not bring the transfer within the state. Thus the New York legislature

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nor the memorandum of sale, nor the delivery is made in this state and no act necessary to effect the transfer is done in this state. * * * ''

In 1933 Section 270 was amended to provide:

'' * * * It is not intended by this article to impose a tax * * * .''

'' * * * in respect to shares or certificates of stock, or certificates of rights to stocks, or certificates of deposit representing certificates of the character taxed by this article, in any domestic association, company or corporation, even though a record of the transfer is made in the stock book kept in compliance with section ten of the stock corporation law, if the transfer is made upon the books of such association, company or corporation regularly kept at a transfer office or by a transfer agent outside the state provided the keeping of such books outside the state is necessary or convenient for the transaction of the ordinary business affairs of such association, company or corporation and is approved by the tax commission, and neither the sale, nor the agreement to sell, nor the memorandum of sale, nor the delivery is made in this state and no act necessary to effect the transfer (other than the making of a record in the stock book kept in compliance with section ten of the stock corporation law) is done in this state. * * * ''

Section 10 of the New York Stock Corporation Law provides:

'' * * * Every stock corporation shall keep * * * a book to be known as the stock book * * * . If any such corporation has *in this state* a transfer agent, such stock book may be deposited in the office of such agent, or may be kept in the office of the corporation at its option * * * .'' (Italics ours)

regarded neither the incorporation of the corporation in the state nor the recording of the transfer there as sufficient basis for a tax.

Since the amendment made to the statute in 1933, none of the transfers of stock in New York corporations have been taxable unless (a) there was no regularly conducted, approved transfer agent outside the state where the transfer was recorded or (b) some part of the transaction took place within the state. The statute still provides that recording the transfer on the books within the state does not in itself bring a transfer within the tax.

So the statute has never taxed "every transfer of stock in a New York corporation". Before 1933 all transfers effected outside the state were expressly excluded from the tax. Since 1933 all transfers effected outside the state and recorded by a regularly conducted, approved transfer agent outside the state have been expressly excluded from the tax. In the case at bar, the only transfer agent in existence was outside the State of Utah and no part of the transfer took place in that state—so, using the New York criteria, the transfer was beyond the reach of the tax.

(2) There has been no decision upholding the constitutionality of the New York stock transfer tax where the transfer taxed took place completely outside the state. In each of the cases dealing with aspects of constitutionality the transfer taxed took place within the state (*New York ex rel. Hatch* v. *Reardon*, 204 U. S. 152 (1907); *Vaughn* v. *State of New York*, 272 N. Y. 102, 5 N. E. (2d) 53 (1936); *Williams* v. *State of New York*, 273 N. Y. 458 (1936); *O'Kane* v. *State of New York*, 283 N. Y. 439, 28 N. E. (2d) 905 (1940)).

Whatever strength there is in the analogy suggested by the petitioner, therefore, supports the position of the Respondents not that of the petitioner in the case at bar.

We now come to the significance of the location of the transfer office. It has been held that for the purpose of transfer, the shares of stock of a corporation must be re-

garded as having a situs where the transfer books and records of the corporation are kept.

Lockwood v. *U. S. Steel Corp.*, 209 N. Y. 375, 103 N. E. 697 (1913);
Lohman v. *Kansas City Southern Railway Co.*, 326 Missouri 819, 33 S. W. (2d) 112 (1930);
Vidal v. *South American Securities Co.*, 276 Fed. 855 (C. C. A. 2nd) (1922).

In the *Lockwood* case a question was presented as to whether an executor appointed in New York for a Bermuda decedent had jurisdiction over the decedent's shares of stock in a New Jersey corporation and could compel their transfer in New York. The certificates were physically located in New York and the corporate transfer office was here. The Court of Appeals through Judge Bartlett referred to the view that the situs of shares of stock of a corporation could be only in one of two places, the domicile of the corporation (in that case New Jersey) or the domicile of the decedent (Bermuda), and stated (p. 385):

> "In the present case, however, it is alleged in the complaint and necessarily admitted by the demurrer that the defendant maintains in the county and city of New York an office for the purpose of receiving certificates of its corporate stock for transfer upon its books and of delivering new certificates when such transfers have been made. Does not this fact constitute New York the domicile of the corporation, to some extent at least—so far as the registry and transfer of shares therein are concerned? We think it does. * * * "

In the case at bar, the law of New York granted Mr. Harkness the right to transfer his shares by his will and the law of that State determined the rights of his beneficiaries in the transfer. The enactment of the Uniform Stock Transfer Act by Utah was a recognition by that State that for the purposes of transfer, at least, the shares of stock

of its corporations were merged in the certificates. Power over the transfer of the shares was acknowledged to rest elsewhere than in the state of incorporation. The sole transfer office of the Union Pacific Railroad Company was in New York (R. 2), and the new certificates will be issued there. Nothing had to be done in Utah, no resort had to be made to the law of Utah to complete the transfer of the ownership of the decedent's shares.

Hence, in connection with the testamentary transfer of these shares of stock, the State of Utah has played no part and has given nothing for which to exact a tax.

CONCLUSION

The judgment under review should be affirmed.

Respectfully submitted,

MELBER CHAMBERS,
Counsel for Respondents.

p 12.

SUPREME COURT OF THE UNITED STATES.

No. 814.—October Term, 1941.

The State Tax Commission of Utah, Petitioner, *vs.* Malcolm P. Aldrich and Mary S. Harkness, Administrators with the Will Annexed of the Estate of Edward S. Harkness, Deceased.	On Writ of Certiorari to the Supreme Court of the State of Utah.

[April 27, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

The sole question presented by this case is whether the State of Utah is precluded by the Fourteenth Amendment from imposing a tax upon a transfer by death of shares of stock in a Utah corporation, forming part of the estate of a decedent who, at the time of his death, was domiciled in the State of New York and held there the certificates representing those shares.

In 1940 Edward S. Harkness died testate, being at that time domiciled in New York. His estate was probated in New York where respondents were appointed executors. Respondents were also appointed administrators with the will annexed in Utah. At the time of his death Harkness was the owner of 10,000 shares of common stock and 400 shares of preferred stock of the Union Pacific Railroad Co., a Utah corporation. The certificates representing those shares were never within Utah. They were in the possession of Harkness in New York at the time of his death and are now held by respondents. For many years the Union Pacific Railroad Co. has kept its stock books and records and transfer agents in New York and has not maintained any in Utah. These shares are the only property owned by decedent which is claimed to be within the jurisdiction of Utah. At the date of decedent's death a New York statute allowed as a credit against the estate tax imposed by New York the amount of any constitutionally valid estate

or inheritance tax paid to any other state within three years after the decedent's death.[1]

Respondents sought a declaratory judgment in the Utah court holding that the transfer of the shares was not subject to tax by Utah under the provisions of its inheritance tax law.[2] The trial court entered judgment for respondents. The Supreme Court of Utah, under the compulsion of *First National Bank* v. *Maine*, 284 U. S. 312, affirmed. — Utah —, 116 Pac. 2d 923. We granted the petition for certiorari so that the constitutional basis of *First National Bank* v. *Maine* could be reexamined in the light of such recent decisions as *Curry* v. *McCanless*, 307 U. S. 357, and *Graves* v. *Elliott*, 307 U. S. 383. And see *Commonwealth* v. *Stewart*, 338 Pa. 9, aff'd 312 U. S. 649.

There can be no doubt but that the judgment below should be affirmed if *First National Bank* v. *Maine* is to survive, as the judgment in that case prohibited the State of Maine from doing what the State of Utah is here attempting. But we do not think it should survive. And certainly it cannot if the principles which govern the *Curry* and *Graves* cases rest on firm constitutional grounds.

First National Bank v. *Maine*, like its forerunners *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204 and *Baldwin* v. *Missouri*, 281 U. S. 586, read into the Fourteenth Amendment a "rule of immunity from taxation by more than one state." 284 U. S. p. 326. As we said in the *Curry* case that doctrine is of recent origin. Prior to 1930, when *Blackstone* v. *Miller*, 188 U. S. 189, was over-

[1] N. Y. L. 1930, c. 710, § 1, amended L. 1934, c. 639, § 1; McKinney's Cons. L., Bk. 59, Tax Law, § 249-o. This section was repealed by L. 1940, c. 138. For the present provision see McKinney, *op. cit.*, Cum. Ann. Pt. (1941) § 249-o.

[2] Rev. Stat. Utah, 1933, § 80-12-2 provides:

"'A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, whether a resident or nonresident of this state:

"Three per cent of the amount by which the net estate exceeds $10,000 and does not exceed $25,000;

"Five per cent of the amount by which the net estate exceeds $25,000."

Sec. 80-12-3 provides:

"The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any other state or country, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death."

ruled by *Farmers Loan & Trust Co.* v. *Minnesota*, the adjudications of this Court clearly demanded a result opposite from that which obtained in *First National Bank* v. *Maine*. That was recognized by the majority in the latter case (284 U. S. p. 321)—and properly so because *Blackstone* v. *Miller* rejected the notion that there were constitutional objections to double taxation of intangibles by States which had command over them or their owner. And see *Kidd* v. *Alabama*, 188 U. S. 730, 732. *Blackstone* v. *Miller* permitted New York to tax the transfer of debts owed by New York citizens to a decedent who died domiciled in Illinois, although Illinois had taxed the entire succession. Mr. Justice Holmes, speaking for the Court, upheld the power of New York to collect the tax because the transfer of the debts "necessarily depends upon and involves the law of New York for its exercise". 188 U. S. p. 205. It was that view which the minority in *First National Bank* v. *Maine* championed. They maintained that there was no constitutional barrier to taxation by Maine of the transfer of the shares of stock of the Maine corporation, since the nature and extent of the decedent's interest in the shares were "defined by the laws of Maine, and his power to secure the complete transfer" was "dependent upon them." 284 U. S. p. 332. That view had been repeatedly expressed in other earlier cases touching on the rights of a State to tax intangibles over which it had command though the owner was a non-resident. *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490, 503-504; *Hawley* v. *Malden*, 232 U. S. 1, 12; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401; *Frick* v. *Pennsylvania*, 268 U. S. 473, 497; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69, 81. As stated by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, the power to tax "is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation. . . ."

It was that view which we followed in the *Curry* case. We held there that the Fourteenth Amendment did not prevent both Alabama and Tennessee from imposing death taxes upon the transfer of an interest in intangibles held in trust by an Alabama trustee but passing under the will of a beneficiary decedent domiciled in Tennessee. We stated that rights to intangibles "are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in

courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. . . . . Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities." 307 U. S. p. 366. We held that the power to tax intangibles was not restricted to one State whether "we regard the right of a state to tax as founded on power over the object taxed, as declared by Chief Justice Marshall in *McCulloch* v. *Maryland*, *supra*, through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both". *Id.* pp. 367-368. And we added: "Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; and income may be taxed both by the state where it is earned and by the state of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state." *Id.*, p. 368. In the recent case of *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444, we gave renewed expression to the same view: "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." And see *Graves* v. *Schmidlapp*, No. 604, decided March 30, 1942.

Furthermore, the rule of immunity against double taxation espoused by *First National Bank* v. *Maine* had long been rejected in other cases. *Kidd* v. *Alabama, supra; Fort Smith Lumber Co.* v. *Arkansas*, 251 U. S. 532; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325. We rejected it again only recently. *Illinois Central Railroad Co.* v. *Minnesota*, 309 U. S. 157. And as we pointed out in the *Curry* case the reasons why the Fifth Amendment "does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner" (*Burnet* v. *Brooks*, 288 U. S. 378) are no less cogent in case of the Fourteenth. 307 U. S. pp. 369, 370.

The recent cases to which we have alluded are all distinguishable on their facts. But their guiding principles are irreconcilable with the views expressed in *First National Bank* v. *Maine*. If we raised a constitutional barrier in this case after having let it down in the *Curry* case, we would indeed be drawing neat legal distinctions and refinements which certainly cannot be divined from the language of the Constitution. Certainly any differences between the shares of stock in this case and the intangibles in the *Curry* case do not warrant differences in constitutional treatment so as to forbid taxation by two States in the one case and to permit it in the other. If we perpetuated any such differences, we would be doing violence to the words "due process" by drawing lines where the Fourteenth Amendment fails to draw them. Furthermore, the legal interests in the intangibles here involved are as diverse as they were in the intangibles in the *Curry* case. And to say that these shares of stock were localized or had an exclusive situs in New York would be to indulge in the fiction which we rejected in the *Curry* case. Any such attempt to fix their whereabouts in New York would disregard the intimate relationship which Utah has to this corporation and its shares.

More specifically, if the question is "whether the state has given anything for which it can ask return" (*Wisconsin* v. *J. C. Penney Co., supra*, p. 444) or whether the transfer depends upon and involves the law of Utah for its exercise (*Blackstone* v. *Miller*) there can be no doubt that Utah is not restrained by the Fourteenth Amendment from taxing this transfer. The corporation owes its existence to Utah. Utah law defines the nature and extent of the interest of the shareholders in the corporation. Utah law affords protection for those rights. Utah has power over the transfer by the corporation of its shares of stock. Certainly that protection, benefit, and power over the shares would have satisfied the test of *Blackstone* v. *Miller* and *Curry* v. *McCanless*. But it is said that we are here interested only in the *factum* of the transfer and that the stockholder in the case at bar had no need to invoke the law of Utah to effect a complete transfer of his interest. The argument is based on the fact that the transfer office is located outside Utah and that under the Uniform Stock Transfer Act which Utah has adopted (Rev. Stat. 1933 §§ 18-3-1 *et seq.*) the trend is to treat the shares as merged into the certificates in situations involving the ownership and transfer of the shares. We do not stop to

analyze the many cases which have been cited nor to speculate as to how Utah would interpret its law in this regard. Suffice it to say that if that freedom of transfer exists as respondents claim, it stems from Utah law. It finds its ultimate source in the authority which Utah has granted. It is indeed a benefit which Utah has bestowed. For it alone Utah may constitutionally ask a return. In view of these realities we cannot say with the majority in *First National Bank* v. *Maine*, p. 327, that a "transfer from the dead to the living of any specific property in an event single in character and is effected under the laws, and occurs within the limits, of a particular state", so as to preclude Utah from imposing a tax on this transfer.

We are of course not unmindful of the notions expressed in *Farmers Loan & Trust Co.* v. *Minnesota* and repeated in *First National Bank* v. *Maine* that the view championed by *Blackstone* v. *Miller* disturbed the "good relations among the States" and had a "bad" practical effect which led many States "to avoid the evil by resort to reciprocal exemption laws." 280 U. S. p. 209. But as stated by the minority in *First National Bank* v. *Maine*, "We can have no assurance that resort to the Fourteenth Amendment, as the ill-adapted instrument of such a reform, will not create more difficulties and injustices than it will remove." 284 U. S. p. 334. More basically, even though we believed that a different system should be designed to protect against multiple taxation, it is not our province to provide it. See *Curry* v. *McCanless*, *supra*, pp. 373-374. To do so would be to indulge in the dangerous assumption that the Fourteenth Amendment "was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." Mr. Justice Holmes, dissenting, *Baldwin* v. *Missouri*, *supra*, p. 595. It would violate the first principles of constitutional adjudication to strike down state legislation on the basis of our individual views or preferences as to policy, whether the state laws deal with taxes or other subjects of social or economic legislation.

For the reasons stated we do not think that *First National Bank* v. *Maine* should survive. We overrule it. In line with our recent decisions in *Curry* v. *McCanless*, *Graves* v. *Elliott* and *Graves* v. *Schmidlapp* we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State. In case of shares of stock "jurisdiction to tax" is not restricted to the domiciliary State. Another State which has extended benefits

or protection or which can demonstrate "the practical fact of its power" or sovereignty as respects the shares (*Blackstone* v. *Miller*, p. 205) may likewise constitutionally make its exaction. In other words, we restore these intangibles to the constitutional status which they occupied up to a few years ago. See *Greves* v. *Shaw*, 173 Mass. 205; *Larson* v. *MacMiller*, 56 Utah 84; and cases collected in 42 A. L. R. pp. 365 *et seq.*

We reverse the judgment below and remand the cause to the Supreme Court of Utah for proceedings not inconsistent with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S

SUPREME COURT OF THE UNITED STATES.

No. 814.—October Term, 1941.

The State Tax Commission of Utah, Petitioner, *vs.* Malcolm P. Aldrich and Mary S. Harkness, Administrators with the Will Annexed of the Estate of Edward S. Harkness, Deceased. | On Writ of Certiorari to the Supreme Court of the State of Utah.

[April 27, 1942.]

Mr. Justice Frankfurter, concurring.

A case of this kind recalls us to first principles.

The taxing power is an incident of government. It does not derive from technical legal concepts. The power to tax is coextensive with the fundamental power of society over the persons and things made subject to tax. Each State of the Union has the same taxing power as an independent government, except insofar as that power has been curtailed by the federal Constitution.

The taxing power of the States was limited by the Constitution and the original ten amendments in only three respects: (1) no State can, without the consent of Congress, lay any imposts or duties on imports or exports, except as necessary for executing its inspection laws, Art. I, Sec. 10[2]; (2) no State can, without the consent of Congress, lay any tonnage duties, Art. I, Sec. 10[3]; and (3) by virtue of the Commerce Clause, Art. I, Sec. 8[3], no State can tax so as to discriminate against interstate commerce. (For present purposes I put the Contract Clause to one side). None of these limitations touches the power of a State to create corporations and the incidental power to tax opportunities which such State-created corporations afford.

This phase of the taxing power, rooted in the established practices of the States in common with other governments, was not suddenly abrogated on July 28, 1868, when the Fourteenth Amendment became the law of the land. On the contrary, taxes based on the States' power over corporations of their own creation thereafter became an increasingly familiar source of revenue. Of course, the

Due Process Clause has its application to the taxing powers of the States—a State cannot tax a stranger for something that it has not given him. When a State gives nothing in return for exacting a tax it may be said that there is no "jurisdiction to tax". But that phrase obscures rather than enlightens, for it only states a result and does not analyze the Constitutional problem. The right of a State to tax the effective acquisition of membership in a domestic corporation, wherever the piece of paper representing such a taxable interest may be physically located,—the immediate question before us—was not doubted until the decision of this Court only ten years ago in *First National Bank* v. *Maine*, 284 U. S. 312. That decision, as was made clear in its dissent, was an unwarranted deviation from unbroken legal history and fiscal practice. Drawn as the decision was "from the void of 'due process of law', when logic, tradition and authority have united to declare the right of the State to lay" such a tax (Holmes, J., dissenting in *Baldwin* v. *Missouri*, 281 U. S. 586, 596), due regard for the Constitution demands that the deviation be not perpetuated and that the power erroneously withdrawn from the States be again recognized.

Modern enterprise often brings different parts of an organic commercial transaction within the taxing power of more than one State, as well as of the nation. It does so because the transaction in its entirety may receive the benefits of more than one government. And the exercise by the States of their Constitutional power to tax may undoubtedly produce difficult political and fiscal problems. But they are inherent in the nature of our federalism and are part of its price. These difficulties are not peculiar to us. Kindred problems have troubled other constitutional federalisms. For Australia, see Report of the Royal Commission on the Constitution, Parliament of the Commonwealth of Australia (1929), p. 187 *et seq.*; for Canada, see 1 Report of the Royal Commission on Dominion-Provincial Relations (1940), p. 202 *et seq.*

"A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case." Holmes, J., dissenting in *Farmers Loan Co.* v. *Minnesota*, 280 U. S. 204, 218. We would have to read into that Amendment private notions as to tax policy. But whether a tax is wise or expedient is the business of the political branches of government, not ours. Considerations relevant to invalidation of a tax measure are wholly different from those that

come into play in justifying disapproval of a tax on the score of political or financial unwisdom.

It may well be that the last word has not been said by the various devices now available—through uniform and reciprocal legislation, through action by the States under the Compact Clause, Art. I, Sec. 10[3], or through whatever other means statesmen may devise—for distributing wisely the total national income for governmental purposes as between the States and the Nation. But even if it were possible to make the needed adjustments in the fiscal relations of the States to one another and to the federal government through the process of episodic litigation—which to me seems most ill-adapted for devising fiscal policies—it is enough that our Constitutional system denies such a function to this Court.

I agree, therefore, that *First National Bank* v. *Maine* should be overruled and that the tax imposed by Utah in this case is valid. To refuse to nullify legislation the frailties of which we think we see, is to respect the bounds of our Constitutional authority and not to indulge in a fiction. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129. To allow laws to stand is to allow laws to be made by those whose task it is to legislate. The nullification of legislation on Constitutional grounds has been recognized from the beginning as a most "delicate" function not to be indulged in by this Court simply because it has formal power to do so but only when compelling considerations leave no other choice. To suggest that when this Court finds that a law is not offensive to the Constitution and that it must therefore stand, we make the same kind of judgment as when on rare occasions we find that a law is offensive to the Constitution and must therefore fall, is to disregard the rôle of this Court in our Constitutional system since its establishment in 1789.

SUPREME COURT OF THE UNITED STATES.

No. 814.—October Term, 1941.

The State Tax Commission of Utah, Petitioner, *vs.* Malcolm P. Aldrich and Mary S. Harkness, Administrators with the Will Annexed of the Estate of Edward S. Harkness, Deceased. } On Writ of Certiorari to the Supreme Court of the State of Utah.

[April 27, 1942.]

Mr. Justice Jackson, dissenting.

State taxation of transfer by death of intangible property is in something of a jurisdictional snarl, to the solution of which this Court owes all that it has of wisdom and power. The theoretical basis of some decisions in the very practical matter of taxation is not particularly satisfying.[1] But a switch of abstract concepts is hardly to be expected without at least careful consideration of its impact on the very practical and concrete problems of states and taxpayers. Weighing the highly doctrinaire reasons advanced for this decision against its practical effects on our economy and upon our whole constitutional law of state taxation, I can see nothing in the Court's decision more useful than the proverbial leap from the frying pan into the fire.

I.

There is little persuasion and certainly no compulsion in the authorities mustered by the Court's present opinion, which are either admittedly overruled cases, such as *Blackstone* v. *Miller*, 188 U. S. 189, or admittedly distinguishable ones, such as *Curry* v. *McCanless*, 307 U. S. 357; *Graves* v. *Elliott*, 307 U. S. 383; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. Such authorities are not

[1] Of one of them Mr. Justice Holmes said: "It seems to me that the result reached by the Court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment . . ." Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 211.

impressive in vindication of such a judgment. Without discussion of the academic merits of the decision that is being overruled I am willing to proceed on the estimate of it made at the time of its pronouncement by the present Chief Justice, who said in his dissent: "*Situs* of an intangible, for taxing purposes, as the decisions of this Court, including the present one, abundantly demonstrate, is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired." *First National Bank* v. *Maine*, 284 U. S. 312, 332. The Court now discards this fiction in favor of one calling for a different result.

This older rule ascribed a fictional consequence to the domicile of a natural person; it is overruled by ascribing a fictional consequence to the domicile of an artificial corporation. The older rule emphasized dominance by the individual over his intangible property, the tax situs of which followed the domicile of its owner. Today's new rule emphasizes the dominance of the corporation, a creature of the legal imagination.[2] To this fictional personality it ascribes a hypothetical "domicile" in a place where it has but a fraction of its property and conducts only its formal corporate activities; and on the union of these two fictions it permits the chartering state to tax the estates of persons who never lived or did business therein. The reasoning back of the holding is this: Because Utah issued a charter to a corporation, which issued stock to a nonresident, which changed hands at his death, which required a transfer on the corporation's books, which transfer was permitted by Utah law, Utah got jurisdiction to tax succession to the stock. It is really as remote as that.

No one questions that a state which charters a corporation, even though it amounts to no more than giving "to airy nothing a local

[2] A corporation is defined by John Marshall as "an artificial being, invisible, intangible, and existing only in contemplation of law." Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636. The New York Court of Appeals has said: "A corporation, however, is a mere conception of the legislative mind. It exists only on paper through the command of the legislature that its mental conception shall be clothed with power." People v. Knapp, 206 N. Y. 373, 381. "It took half a century of litigation in this Court finally to confer on a corporation, through the use of a fiction, citizenship in the chartering state for jurisdictional purposes. . . . Throughout, the mode of thought was metaphorical." Mr. Justice Frankfurter, in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 169. Compare the cases where courts are obliged to disregard the corporate entity to avoid a variety of injustices. See Wormser, Disregard of the Corporate Fiction (1927).

habitation and a name," has the right to exact a charter fee, an incorporation tax, or a franchise tax from the artificial entity it has created. But that such chartering enables the taxing arm of the state to reach the estate of every stockholder, wherever he lives, and to tax the entire value of the stock because of "opportunities which it has given," "protection which it has afforded," or "benefits which it has conferred" is quite another matter. Utah is permitted to tax the *full value* of each share of Union Pacific stock passing by death. Any conceivable "opportunity," "protection," or "benefit" derived by the Union Pacific stockholders from Utah is negligible in proportion to the values Utah is authorized to tax.

It would be hard to select a case that would better demonstrate the fictional basis of the Court's doctrine of benefits and protection than this case of Utah and the Union Pacific Railroad. When Utah was admitted to statehood in 1896, the Union Pacific Railroad was already old as a national institution. The first white settlement in Utah made by the Mormons was in its second year when President Taylor recommended to Congress consideration of a railroad to the Pacific as a "work of great national importance and of a value to the country which it would be difficult to estimate."[3] In 1853, Congress appropriated $150,000 to make explorations and surveys to "ascertain the most practical and economical route."[4] In 1860, both the leading political parties in their platforms declared in favor of building such a road.[5] President Lincoln on July 1, 1862, signed[6] the war measure creating the Union Pacific Railroad Company and subsidizing the construction of the road,[7] which opened

[3] 6 Messages and Papers of the Presidents 2558, Message of December 4, 1849. President Buchanan also repeatedly recommended the road as a defense necessity to be constructed under the war power. *Id.* at 2988; *Id.*, Vol. 7, at 3057, 3103, 3181.

[4] 10 Stat. 219.

[5] Trottman, History of the Union Pacific (1923) 8.

[6] Sandburg, Abraham Lincoln—The War Years, Vol. 1, 510. See also Vol. 2, 461, for an account of Lincoln's selection of the location of its eastern terminal.

[7] It granted a right of way across the public lands owned by the United States and a subsidy loan of $16,000 per mile for the construction on the plain, $48,000 per mile for one hundred and fifty miles over the Rocky Mountains, and $32,000 per mile for the remainder. The construction amounted to 1,034 miles, and the subsidy loan to $27,236,512. The Central Pacific for 883 miles constructed from San Francisco to meet the Union Pacific received nearly an equal amount. 12 Stat. 489. Further grants were made by an Act of July 2, 1864, 13 Stat. 356.

on May 10, 1869.[8] The story of the Union Pacific has been a part of our national history. Not even its scandals were local. Its Credit Mobilier scandal rocked the nation.[9]

The road continued to be a national problem as well as a national enterprise. President Cleveland recommended to Congress in his message of December 3, 1894 consideration of reorganization.[10] The steps taken by the Government were reported to the Congress by President McKinley in his annual messages of 1897, 1898, and 1899. He reported the sale of the Union Pacific main line under the decree of the United States Court for the District of Nebraska on November 1 and 2, 1897.[11] Utah, on July 1, 1897, granted a charter to the present Union Pacific Railroad Company, as the Federal Government or any one of several state governments might have done. It has become one of the great and stable transportation systems of the United States.

If it had only the "opportunities" and "benefits" conferred by Utah and only the properties protected by her laws, the Union Pacific would cut little figure either in transportation or finance. It holds its stockholders' meetings in that State. But it maintains no executive office or stock transfer office in Utah. Its executive and stock transfer offices are in New York City. Its stocks are listed on the New York, Boston, London, and Amsterdam stock exchanges. Over 200,000 shares of its stock were traded on the New York Stock Exchange in 1939.[12] Its western operating office is not in Utah, but in Omaha, Nebraska. It is stipulated that less than 9% of its 9877 miles of trackage are in Utah and that during 1939, the railway operating revenue from Utah intra-state business plus the Utah proportion on a mileage basis of its interstate business was 8.97% of the entire gross operating revenues of the company.

What gives the Union Pacific stock its value, all of which is appropriated by this decision to Utah's taxing power, is its operation in interstate commerce, a privilege which comes from the United States and one which Utah does not give or protect and could not deny. The Union Pacific system itself is in interstate operation, embracing thirteen states and drawing its business from the whole

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[8] 11 Messages and Papers of the Presidents 638.

[9] Bowers, The Tragic Era (1929) 396 *et seq.*

[10] 13 Messages of the Presidents 5969.

[11] 13 Messages of the Presidents 6273, 6343, 6390.

[12] Moody's Steam Railroads (1940) 907.

country. Approximately 37% of its total tonnage was received from connecting lines.[13] If the values derived from privileges extended by the National Government and from rendering national transportation were to be allocated to any single state for tax purposes, a realistic basis would entitle the five States of Idaho, Kansas, Nebraska, Oregon, and Washington to some consideration, for each embraces, authorizes, and protects by its laws more miles of trackage than does Utah.[14]

These facts leave nothing of Utah's claim to tax the full value of Union Pacific shares when transferred by death of a nonresident stockholder, and no basis for the Court's decision that it may do so, except the metaphysics of the corporate charter.

II.

The theories on which this case is decided contrast sharply with certain hard facts which measure the decision's practical wisdom or lack of it.

1. The effect of the Court's decision is to intensify the already unwholesome conflict and friction between the states of the Union in competitive exploitation of intangible property as a source of death duties.

The practical issue underlying this case is not whether the Harkness estate shall pay or avoid a transfer tax. The issue is whether Utah or New York will collect this tax. It is admitted that if this Court breathes constitutionality into this Utah tax, all that Utah gets will be credited to the Harkness estate on its tax payable in New York as the state of domicile. The right of a state to tax succession to corporate stock by death of one domiciled therein, while not abrogated, is now subjected to an interfering and overlapping right of the state which chartered the corporation to tax the same stock transfer on a different and inconsistent principle. Since the chartering state has apparently been empowered to exact its tax as a condition of permitting the transfer, the taxing power of the state of the stockholder's domicile is really subordinated and deferred to the taxing power of the chartering state. By laying its tax on the gross value transferred, irrespective of the net value of the decedent's estate, the chartering state may give

[13] Moody's Steam Railroads (1940) 895.

[14] Mileage of the system is as follows: (1) Idaho, 2051.12; (2) Nebraska, 1355.68; (3) Oregon, 1172.48; (4) Kansas, 1159.87; (5) Washington, 1047.04; (6) Utah, 888.47; (7) Wyoming, 717.32; (8) Colorado, 609.13; (9) California, 390.52; (10) Nevada, 358.12; (11) Montana, 143.46; (12) Iowa, 2.48; (13) Missouri, 2.16. Moody's Steam Railroads (1940) 893.

its tax an effective priority of payment over the taxes laid by the domiciliary state and may collect what amounts to an inheritance tax even when there is no net estate to transfer. Thus, through the corporate charter fiction the chartering state may thrust its own tax with extraterritorial effect between the taxing power of the state of domicile and tax resources to which that State has had, and I think should have, first and under ordinary circumstances exclusive resort.

2. To subject intangible property to many more sources of taxation than other wealth prejudices its relation to other investments and other wealth by a discrimination which has no basis in the function that intangibles perform for our present society.[15] Intangibles, except for government issues, are an outgrowth of our modern corporation system. Of relatively recent growth, the corporation has become almost the unit of organization of our economic life. Whether for good or ill, the stubborn fact is that in our present system the corporation carries on the bulk of production and transportation, is the chief employer of both labor and capital, pays a large part of our taxes, and is an economic institution of such magnitude and importance that there is no present substitute for it except the state itself. Except for the easy circulation and ready acceptability of pieces of paper characterized as stocks or bonds, this existing system could not function. It is these intangible symbols or tokens which give liquidity and mobility to otherwise fixed underlying plant assets, which give ready negotiability to fractional interests therein that would otherwise transfer with difficulty, and which divide among many both benefits and risks from aggregation of properties whose successful functioning for society requires unified management of the bulk. The amount of plant and material and goods in process, working capital, good will, and organization at any time devoted to enterprise substantially will depend

[15] The burdens imposed by the present decision are cumulative and must be considered in relation to taxation of intangibles in some circumstances by states other than that of domicile (Curry *v.* McCanless, 307 U. S. 357; Graves *v.* Elliott, 307 U. S. 383) and also in reference to the closing of the federal courts to both state and taxpayers where different state courts make inconsistent findings on domicile resulting in estate taxation by two or more states. Massachusetts *v.* Missouri, 308 U. S. 1; Texas *v.* Florida, 306 U. S. 398; Worcester County Trust Co. *v.* Riley, 302 U. S. 292; New Jersey *v.* Pennsylvania, 287 U. S. 580; Dorrance *v.* Pennsylvania, 287 U. S. 660 and 288 U. S. 617, certiorari denied to review Dorrance's Estate, 309 Pa. 151; Hill *v.* Martin, 296 U. S. 393; Dorrance *v.* Martin, 298 U. S. 678, certiorari denied to review Dorrance *v.* Thayer-Martin, 116 N. J. L. 362; Sargent and Tweed, Death and Taxes are Certain—But What of Domicile?, 53 Harvard Law Review 68; cf. Treines *v.* Sunshine Mining Co., 308 U. S. 66.

upon the willingness of the public to stand in the position of stockholder or bondholder. When this Court determines that the effect of owning this type of circulating medium is to subject the estate of the owner to an inheritance tax from every state that chartered one of the companies in which he has invested, it imposes a handicap on such ownership that is substantial and influential upon our economy.

Not one substantial evil is said by the opinion in this case to flow from the rule being upset, and evils of some magnitude admittedly follow from the one being reinstated. These consequences the Court declines even to consider, although they bear upon a segment of our economy bigger than the national debt[16] and affect more persons than are now in the armed forces.[17] Intangibles constitute well above 50% of all property transferred by death[18]

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[16] U. S. Treasury Statistics of Income for 1938, Part II, p. 4 (latest available) shows that 520,501 corporations filed returns. 169,884 of them reported net income aggregating $6,525,979,257, while 301,148 reported an aggregate loss for the year of $2,853,097,727.

The Commissioner computes dividends paid in cash or assets other than stock to have been $5,013,432,827. *Id.* at 22.

Balance sheets were submitted by 411,941 corporations showing total assets of $300,021,727,000. *Id.* at 28.

The volume of intangibles afloat as a result of corporate financing is not specifically calculated, but some idea of it is gleaned from the aggregate of items as follows:

Common stocks	$74,791,662,000
Preferred stocks	18,108,066,000
Bonds, notes and mortgages— maturity 1 year or more...	56,278,233,000 *Ibid.*

[17] I know of no accurate calculation of the number of persons who hold stocks or bonds. Many estimates are extravagant and include an enormous amount of duplications—for example, the aggregate of stockholders' lists of all corporations. I think the estimate of Berle and Means as of 1927 that between four and six million persons owned stocks, including an estimated two million employee or customer stockholders, is a reasonable one. The Modern Corporation and Private Property (1934) 374. Many are, of course, also bondholders, and the number to be added after allowing for duplication is difficult to estimate. It must also, of course, be borne in mind that this includes many very small holdings and that such statistics are of little value in considering the relative benefits from such holdings derived by those in different income brackets.

[18] United States Treasury Statistics of Income for 1938, Part I, p. 220, shows that 15,221 estates filed returns showing total gross estates of $2,746,143,000, of which real estate was $433,487,000, tangible personal property, $34,637,000, and intangible personal property $2,278,019,000.

The intangibles so reported included:

Capital stock in corporations	$1,079,231,000
State and municipal bonds	242,537,000
Government bonds	148,802,000
Other bonds	164,796,000

Of course it does not follow that the same proportions hold good for estates too small to be reported under federal law. Because they would be more

and an even greater proportion of that transferred by gift, which I assume is equally vulnerable to this tax[19] The gravity of subjecting such extensive interests to complex, confusing, and overlapping tax jurisdictions should be weighed against the reasons advanced for the change.

The revenue that the states may collect in consequence of this decision is not the measure of the burden it imposes on taxpayers. The ascertainment of taxes of this type is costly and wasteful. Such taxation frequently requires taking out ancillary letters in the state of the corporation's domicile, the hiring of local counsel, the furnishing of affidavits to local probate courts and inheritance tax officials, and the payment of various fees, costs, and expenses. For the assurance of local creditors, bonds are sometimes required and long kept in force. Realization upon assets and distribution of estates is delayed by inability to get waivers or consents to transfer until after extensive proceedings have been conducted. The seriousness of these burdens is increased if the decedent owns stock in consolidated corporations incorporated in several states, and under this decision stocks of some consolidated railroads would be subject to tax on their full values by five or six states. One need not be unduly soft-hearted towards taxpayers to doubt whether the exhaustion of estates through multiplication of reports, returns, appraisals, litigation, counsel fees, and expenses ultimately makes for a sound fiscal policy or an enlightened social policy.

Moreover, the burdens imposed by this type of taxation are unequal and capricious and in inverse order to the ability of the estate to pay. I suppose we need have little anxiety about Mr. Harkness's $87,000,000 net estate with its $1,000,000 investment in Union Pacific stock. As we have pointed out, it is not he, but the State of New York, that will pay this tax to the State of Utah. And if New York had no provision in its statutes for credit and Mr. Harkness could have foreseen the shift of position of this Court, it is not likely that he would have been caught with the tax.

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heavily weighted with farm and home owning, I am confident these statistics do not present proportions applicable to all transfers by death. They do, I believe, sustain the statement made in the text.

[19] United States Treasury Statistics of Income for 1938, Part I, p. 264, show total gifts reported for taxation as—

Real Estate	$41,241,000
Stocks and Bonds	214,583,000
Cash	72,390,000
Insurance	21,795,000
Misc.	49,764,000

Those who have large estates and watchful lawyers will find ways of minimizing these burdens. But Mr. Harkness is not a typical Union Pacific stockholder. In 1939, the Union Pacific had 50,131 stockholders.[20] The many small stockholders cannot afford professional counsel or evasion devices. The burden of reports and appraisals and foreign tax proceedings bears heavily upon them because of the relatively small amount involved in their transfers. The new tax we have authorized undermines the principle of graduation of tax burdens in proportion to ability to pay. No tax laid on anything less than the total net worth of the estate can be graduated even roughly according to the principle which progressive modern taxation strives to heed. The imposition of unpredictable assessments from many sources makes it impossible for the state of domicile to make intelligent use of its own taxing power as an instrument of enlightened social policy. Chaos serves no social end.

3. A large majority of the states by experience prior to the *First National Bank* v. *Maine* decision found the system of taxation which this Court imposes on all states today to be unworkable and to constitute a threat to the death tax on intangibles as a state source of revenue. Competitive use by the states of death taxation and immunities invited federal invasion of the field, one phase of which was the enactment by Congress of § 301, Revenue Act of 1926, sustained by this Court in *Florida* v. *Mellon*, 273 U. S. 12. There the Federal Government had laid an estate tax, but retained only 20% of the revenue and used an 80% credit provision to equalize the demands of the states. There was an uneasy premonition among the states that overlapping, capricious, and multiple taxation would lead to federal occupation of the field. Appearing in the *First National Bank* case as *amicus curiae*, the New York State Tax Commission urged that both principle and policy prevent the levying of taxes by more than one jurisdiction, and added: "The New York Tax Commission believes that the present is a crucial period in the development of death taxation in this country and that a false step may make it difficult for the states to retain the death tax as a source of substantial revenue." We revive their difficulties.

Farsighted states saw that the total revenue resources practically available to the states was not increased by overlapping their taxation and invading each other's domiciliary sources of taxation.

[20] Moody's Steam Railroads (1940) 888.

Many felt that justice required credits to their own domiciled decedents' estates for taxes exacted elsewhere, and the credits granted offset largely the revenue derived from the tax. The multiple taxation added substantially to the cost of administration and to the annoyance of taxpayers. Because of these considerations, at the time of argument of *First National Bank* v. *Maine*, thirty-seven states had enacted reciprocity statutes which voluntarily renounced revenues from this type of taxation. The Court was urged to stay the hand of sister states which would not cooperate. The restraint laid by this Court in response to those appeals is now withdrawn at the behest of a state which has at no time enacted a reciprocity statute or given a credit for such taxes paid by its domiciled decedents elsewhere. We have not heard the views of any other state nor considered their concern about retaining the source of taxation opened to them. I do not doubt that today's decision will give a new impetus to federal absorption of this revenue source and to federal incorporation of large enterprises.

4. An unfortunate aspect of this decision is that in common with other judge-made law it has retroactive effect. Consequently, inequalities and injustices will be suffered by states as well as by individuals. For example, the State of New York has written into its own Constitution the limitations on its taxing power which this Court had established by the decision we now overrule.[21] Until it can adjust its constitutional provisions, such a state may not take advantage of the tax privileges the Court confers today, although other states may do so. We have not been advised as to the number of states which have repealed or modified reciprocity or credit provisions in their own statutes or constitutions in re-

[21] Article XVI, § 3 of the New York State Constitution, adopted in 1938, provides:

"Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation. Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally. Undistributed profits shall not be taxed."

That decision apparently ended the necessity for reciprocal exemption and I know of none enacted since. Texas and Missouri appear to have omitted reciprocal exemption provisions in later revisions of their inheritance tax laws.

liance upon the decision we overrule. Credit provisions contained in statutes may be the foundation for claims for refund against domiciliary states as chartering states proceed to take advantage of the privilege of retroactive taxation accorded them by this decision. Estates closed and distributed under existing laws become indebted by force of this decision to chartering states on claims for transfer tax that may have existed in the state statutes but had never been suspected of having constitutional validity. For what periods these claims may have vitality depends on state statutes of limitation. Whether personal liability may be asserted against executors and administrators for failure to pay taxes that our decisions did not tolerate at the time the estates were closed likewise depends on the laws of the chartering states. With confidence we may anticipate that this decision will produce much confusion, some controversy between the states, and a lusty crop of litigation.

III.

The Court casts aside former limitations on state power to tax nonresidents in such terms as to leave doubt whether any legal limitations are hereafter to be recognized or applied. The opinion of the Court says that the state may "constitutionally make its exaction" "which can demonstrate 'the practical fact of its power'." The concurring opinion adds that "Each State of the Union has the same taxing power as an independent country, except insofar as that power has been curtailed by the federal Constitution" and it enumerates three limitations, each of which prohibits a kind of tax or protects kinds of business from tax, but none of them restrains taxation by reference to what we have usually expressed by "jurisdiction". It is true that the concurring opinion says that "the Due Process Clause has its application to the taxing power of the States" but we are not told what it may be, and it is difficult to conceive of a situation where it will ever be useful if it may not be considered as a test of jurisdiction to impose a tax.

Despite today's decision, I trust this Court does not intend to say that might always makes right in the matter of taxation. I hope there is agreement, though unexpressed, that there are limits, and that our problem is to search out and mark those limits. One way to go about it is to say that those states can tax which have the physical power to do so and have conferred some benefits or protection on the taxpayer. Of course there is nothing in the

Constitution about this, but that is a criticism that can be directed at any test that I can think of. My difficulty is that on its face—and as so far applied—this test comes out to the point where might does make right. For in a very real sense every state and territory in the Union has conferred very real benefits upon every inhabitant of the Union. Some states have seen to it that our food is properly produced and inspected; others have fostered and protected the industry upon which we are utterly dependent for the ordinary conveniences of life and for life itself. All of them have yielded up men to provide government at home and to repel the enemy abroad. I am the very real debtor, but am frank enough to say ~~that~~ I hope not a potential taxpayer, of all.

Certain it is that while only corporate stock is expressly mentioned in the opinion or involved in the judgment today, the fiction of benefits and protection is capable of as ready adaptability to other intangible property. Our tomorrows will witness an extension of the taxing power of the chartering or issuing state to corporate bonds and bonds of states and municipalities (by overruling *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204), to bank credits for cash deposited (by overruling *Baldwin* v. *Missouri*, 281 U. S. 586) and to choses in action (by overruling *Beidler* v. *South Carolina*, 282 U. S. 1). And while today the Court sustains only a death transfer tax, its theories are equally serviceable to sustain an income or excise tax on dividends from such stock or interest on bonds or a sales tax, or a gift tax. Whether each chartering or issuing state will be permitted to calculate its tax on some formula that will consider the total property owned by the decedent, I do not know, but in the present trend of decision there is little restraint on such formulas. I therefore take today's decision to mean that any state may lay substantially any tax on any transfer of intangible property toward which it can spell out a conceivable legal relationship.

And since the Due Process Clause speaks with no more clarity as to tangible than as to intangible property, the question is opened whether our decisions as to taxation of tangible property are not due to be overhauled. And if the State of Utah is not denied jurisdiction over the transfer of this stock owned by a New York resident it is difficult to see where the Court could find a basis for denying it jurisdiction to prescribe the rule of succession to it.

The Court, it seems to me, will be obliged to draw the line at which state power to reach nonresidents' estates and extraterritorial transactions comes to an end. I find little difficulty in concluding that exaction of a tax by a state which has no jurisdiction or lawful authority to impose it is a taking of property without due process of law. The difficulty is that the concept of jurisdiction is not defined by the Constitution. Any decision which accepts or rejects any one of the many grounds advanced as jurisdictional for state taxing purposes[22] will read into the Constitution an inclusion or an exclusion that is not found in its text. To read into the Constitution the Court's present concept of jurisdiction through charter granting, and to hold that it follows that the Constitution does not prohibit this tax, is to make new law quite as certainly as to adhere to the concept of jurisdiction according to the decedent's domicile and to hold that the Constitution therefore does prohibit it.[23]

I am content with existing constitutional law unless it appears more plainly that it is unsound or until it works badly in our present day and society.

Mr. Justice ROBERTS concurs in this opinion.

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[22] See Lowndes, State Taxation of Inheritances, 29 Michigan Law Review 850; Hine, Situs of Shares Issued under the Uniform Stock Transfer Act, 87 University of Pennsylvania Law Review 700.

[23] But fear of legislating need not intimidate those of either view. The necessity of eventually finding some jurisdictional basis for state action affecting non-residents presents a problem similar to that stated by Mr. Justice Holmes in Southern Pacific v. Jensen, 244 U. S. 205, 221: "I recognize without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motion." And another candid jurist has said: "I will not hesitate in the silence or inadequacy of formal sources to indicate as the general line of direction for the judge the following: that he ought to shape his judgment of the law in obedience to the same aims which would be those of a legislator who was proposing to himself to regulate the question." Cardozo, The Nature of the Judicial Process (1932) 120.

Where prescribed sources of law fail to guide the judicial process, the Swiss Civil Code provides that the judge "must pronounce judgment according to the rule which he would set up if he were legislator himself." Williams, Sources of Law in the Swiss Civil Code (1923) *et seq.*; Schoch, The Swiss Conflict of Laws, 55 Harvard Law Review 738, 749, note 57. The Swiss may have thought a candid recognition of what necessarily is the practice would forestall judicial disclaimer of responsibility for the practical consequences of law announced.